91-1582

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

ELLWEST STEREO THEATRES OF MEMPHIS, INC., d/b/a EXECUTIVE SOUTH, CHARLES LONG, AND RODNEY SKINNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the mandatory presumption found in the newest federal obscenity statute, 18 U.S.C. § 1466, violate due process, as was acknowledged by both the trial and appellate courts below, and if so, is the remainder of the statute unconstitutionally vague?

II. Even without severing the mandatory presumption as found in 18 U.S.C. § 1466, is the statute unconstitutionally vague?

III. As a method of saving 18 U.S.C. § 1466 from total constitutional invalidation, may a trial court, consistent with general rules of statutory construction and First Amendment concerns, simply ignore the unconstitutional mandatory presumption as written and, rather, instruct the jury with an analogous "permissive inference?"

IV. Does a "permissive inference" jury instruction, allowing one to be found to be "engaged in the business" of selling or transferring obscene matter as a "regular course" of trade or business in violation of 18 U.S.C. § 1466 by the sale of only two copies of a single allegedly obscene videotape, violate the due process clause of the Fifth Amendment, and the free speech and press clauses of the First Amendment?

V. Are a criminal Defendant's rights to present a defense pursuant to the Fifth and Sixth Amendments violated when a Defendant intends to present evidence to rebut a statutory mandatory presumption, the trial court then rules the presumption unconstitutional and indicates the presumption will not be charged to the jury, the

QUESTIONS PRESENTED – Continued

Defendant then rests his case in chief without submitting evidence to rebut the presumption, and the trial court then decides to and does in fact instruct the jury with a permissive inference in the same form as the unconstitutional mandatory presumption?

VI. Does defining community standards, applicable to both prurient appeal and patent offensiveness, as opposed to just patent offensiveness, as a standard of "acceptance," result in a standard of prurient appeal in violation of the First Amendment by requiring the determination to be made of whether a prurient appeal (or the *purpose* of the material) is either "acceptable" or "unacceptable," rather than in determining whether a prurient appeal in fact exists at all?

VII. What is the constitutional standard pursuant to the First Amendment, for finding material to be "patently offensive?"

VIII. Did the trial court below deprive the Defendants of their unfettered use of preemptory challenges by failing to excuse a number of prospective jurors who were unquestionably biased, requiring Defendants to exhaust their preemptory challenges on venirepersons who should have been stricken for cause?

DISCLOSURE OF THE CORPORATE AFFILIATIONS PURSUANT TO RULE 29

Ellwest Stereo Theatres of Memphis, Inc., has no parent companies or subsidiaries to list pursuant to Sup. Ct. R. 29.1.

TABLE OF CONTENTS

Page

Questions Presented i

Disclosure of the Corporate Affiliations Pursuant to Rule 29 iii

Table of Authorities viii

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved ... 2

Statement of the Case 2

Reasons for Granting the Writ:

I. **THE ISSUES OF THE CONSTITUTIONALITY OF THE CHARGING STATUTE, 18 U.S.C. § 1466, THE NEWEST OF THE FEDERAL OBSCENITY STATUTES, AND OF THE JURY CHARGE BELOW PURSUANT TO THAT STATUTE, ARE IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW WHICH SHOULD BE SETTLED BY THIS COURT, PARTICULARLY GIVEN THE FACT THAT BOTH THE TRIAL AND APPELLATE COURTS HERE ACKNOWLEDGED THAT THE STATUTE, AS WRITTEN, VIOLATES DUE PROCESS** 4

A. The mandatory rebuttal presumption as found within 18 U.S.C. § 1466(b) violates the due process clause of the Fifth Amendment pursuant to ***Sandstrom v. Montana***, 442 U.S. 510 (1979), and ***Francis v. Franklin***, 471 U.S. 307 (1985) 4

TABLE OF CONTENTS – Continued

Page

B. The trial court's instruction to the jury of a "permissible inference" in lieu of the unconstitutional mandatory presumption as found in the charging statute violates due process as established by this Court in ***Leary v. United States***, 395 U.S. 6 (1969)..... 6

C. The charging statute, 18 U.S.C. § 1466, is unconstitutionally vague in failing to provide sufficient standards to determine if one is "engaged in the business" of selling or transferring obscene matter..... 9

II. THE DETERMINATION OF THE TRIAL COURT TO INSTRUCT THE JURY WITH A "PERMISSIVE INFERENCE", AFTER THE COURT HAD ALREADY INDICATED THAT THE MANDATORY PRESUMPTION AS FOUND WITHIN THE CHARGING STATUTE WAS UNCONSTITUTIONAL AND WOULD THEREFORE NOT BE CHARGED TO THE JURY, AND FOLLOWING THE RESTING OF THE DEFENDANTS' CASE IN CHIEF, DEPRIVED THE DEFENDANTS OF THEIR ABILITY TO PRESENT EVIDENCE TO REBUT THE PERMISSIVE INFERENCE IN VIOLATION OF THEIR FIFTH AND SIXTH AMENDMENT RIGHTS..... 12

TABLE OF CONTENTS – Continued

Page

III. THE DECISION OF THE SIXTH CIRCUIT AFFIRMING THE PROPRIETY OF CERTAIN JURY INSTRUCTIONS REGARDING "COMMUNITY STANDARDS" AND "PATENT OFFENSIVENESS," IS IN CONFLICT WITH DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS OF APPEALS, AND OTHER STATE COURTS OF LAST RESORT, AS WELL AS NUMEROUS STATE OBSCENITY STATUTES. CORRECTING CONFUSION BETWEEN THE CONCEPTS OF "CONTEMPORARY COMMUNITY STANDARDS" AND "PATENT OFFENSIVENESS," TOGETHER WITH ARTICULATING A SINGLE AND CONSTITUTIONAL STANDARD OF "PATENT OFFENSIVENESS," ARE IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW WHICH SHOULD BE DECIDED BY THIS COURT 14

A. Defining "contemporary community standards" in relation to the prurient appeal element of the obscenity test by a standard of what is "accepted," establishes an obscenity standard in violation of the First Amendment and at odds with this Court's decisions in *Miller v. California*, 413 U.S. 15 (1973) and its progeny 15

B. The failure of this Court to articulate a single and unequivocal constitutional standard for determining "patent offensiveness," has resulted in conflicting legislative and judicial definitions for that term, many of which violate core First Amendment protections 17

TABLE OF CONTENTS – Continued

Page

C. The proper constitutional standard for patent offensiveness, consistent with First Amendment protections, is not that which is personally acceptable or approved, but, rather, what the average person, applying contemporary community standards, would find to be unacceptable for *others* in the community to see; i.e. what the community would not "tolerate" others to see or do 23

IV. THE TRIAL COURT IMPERMISSIBLY IMPINGED UPON THE DEFENDANTS' RIGHT OF PREEMPTORY CHALLENGES IN REQUIRING DEFENDANTS TO UTILIZE PREEMPTORY CHALLENGES ON VENIREPERSONS WHO UNQUESTIONABLY SHOULD HAVE BEEN STRICKEN FOR CAUSE 26

Conclusion 28

Appendix ..... App. 1

Appendix A ..... App. 1

Appendix B ..... App. 14

Appendix C ..... App. 16

Appendix C ..... App. 16

Appendix D ..... App. 17

Appendix E ..... App. 19

Appendix F ..... App. 29

Appendix G ..... App. 34

Appendix H ..... App. 36

TABLE OF CONTENTS – Continued

Page

Appendix I.....App. 39

Appendix J.....App. 45

Appendix K.....App. 48

Appendix L.....App. 54

Appendix M.....App. 56

Appendix N.....App. 62

Appendix O.....App. 75

Appendix P.....App. 76

Appendix Q.....App. 86

Appendix R.....App. 97

LIST OF AUTHORITIES

CASES — Pages

Albright v. State, 501 N.E.2d 488 (Ind. App. 4th Dist. 1986) 21

American Library Ass'n v. Thornburgh, 713 F.Supp. 469 (D.D.C. 1989) 8

Anderson v. Wilson, 289 U.S. 20 (1933) 9

Andrews v. State of Texas, 652 S.W.2d 370 (Tex. Crim. App. 1983) 22

Aptheker v. Secretary of State, 378 U.S. 500 (1964) 8

Asaff v. Texas, 799 S.W.2d 329 (Tex. App. 1990), review refused 22

Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981) 7

Blount v. Rizzi, 400 U.S. 410 (1971) 9

California v. Green, 399 U.S. 149 (1970) 13

Chambers v. Mississippi, 410 U.S. 284 (1973) 13

Collins v. Superior Court, 787 P.2d 1042 (Az. 1986) .16, 22

Commonwealth v. Trainor, 374 N.E.2d 1216 (Mass. 1978) 25

Commonwealth v. United Books Inc., 453 N.E.2d 406 (Mass. 1983) 21

Community Television of Utah, Inc. v. Roy City, 555 F.Supp. 1164 (D. Utah 1982) 21, 22

Doe v. City of Minneapolis, 693 F.Supp. 774 (D. Minn. 1988), aff'd, 898 F.2d 612 (8th Cir. 1990) 7

Dunlap v. Arkansas, 728 S.W.2d 155 (Ark. 1987), cert. denied, 484 U.S. 852 (1987) 22

LIST OF AUTHORITIES – continued

Pages

Fantasy Bookshop, Inc. v. City of Boston, 652 F.2d 1115 (1st Cir. 1981) 7

Faretta v. California, 422 U.S. 806 (1975) 13

Flynt v. State, 264 S.E.2d 669 (Ga. App. 1980), cert. denied, 446 U.S. 981 (1980) 25

Francis v. Franklin, 471 U.S. 307 (1985) 4, 5, 12

Goldstein v. Allain, 568 F.Supp. 1377 (N. D. Miss. 1983) 21, 22

Grayned v. City of Rockford, 408 U.S. 104 (1972) 9

Hart Bookstores, Inc. v. Edmistein, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980) 7

Heckler v. Mathews, 465 U.S. 728 (1984) 8

Home Box Office Inc. v. Wilkinson, 531 F.Supp. 986 (D. Utah, C.D. 1982) 21, 22

Hoover v. Byrd, 801 F.2d 740 (5th Cir. 1986) 22

Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) 9

Irvin v. Dowd, 366 U.S. 717 (1961) 27

Jacobellis v. Ohio, 378 U.S. 184 (1964) 7, 19, 23

Kolender v. Lawson, 461 U.S. 352 (1983) 9

Kingsley International Pictures Corporation v. Regents of N.Y.U., 360 U.S. 684 (1959) 23

Leary v. United States, 395 U.S. 6 (1969) 6, 7

Leech v. American Booksellers Assn., Inc., 582 S.W.2d 738 (Tn. 1979) 21, 22, 24

Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) 18

LIST OF AUTHORITIES – continued

Pages

Miller v. California, 413 U.S. 15 (1973)...15, 17, 18, 20, 23

Olson v. Leeke, 744 F.2d 1061 (4th Cir. 1084), cert. denied, 471 U.S. 1053 (1985)..... 22

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)..... 23

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 13

People v. Ford, 773 P.2d 1059 (Colo. 1989) 22

People v. Nelson, 410 N.E.2d 476 (Ill. App. 2d Dist. 1980) 16, 25

People v. Seven Hundred Thirty Five E. Colfax Inc., 697 P.2d 348 (Colo. 1985)..... 21

Pinkus v. United States, 436 U.S. 293 (1978) 18, 24

Pope v. Illinois, 481 U.S. 497 (1987) 15

Red Bluff Drive-In, Inc. v. Vance, 648 F.2d 1020 (5th Cir. 1981); cert. denied, sub nom. *Theatres West, Inc. v. Holmes*, 545 U.S. 913 (1982)..... 21

Roth v. United States, 354 U.S. 476 (1957).....19, 23

Sable Communications v. FCC, 492 U.S. 115 (1989).... 18

Saliba v. State, 475 N.E.2d 1181 (Ind. App. 2 Dist. 1985).....22, 24, 25

Sandstrom v. Montana, 442 U.S. 510 (1979) 4, 5

Scales v. United States, 367 U.S. 203 (1961)..... 8

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)..... 7

LIST OF AUTHORITIES – continued

Pages

Sedelbauer v. State, 428 N.E.2d 206 (Ind. 1981), cert. denied, 405 U.S. 1035 (1982) 21

Skyywalker Records, Inc. v. Navarro, 739 F.Supp. 578 (S.D. Fla. 1990) 21

Smith v. United States, 431 U.S. 291 (1977) 15, 18

Smith v. United States, 505 F.2d 824 (6th Cir. 1974) 16

State v. Burgun, 384 N.E.2d 255 (Ohio 1978) 20

State v. Cimino, 366 A.2d 1168 (Ct. App. 1976) 21

State v. Roland, 362 S.E.2d 800 (N.C. App. 1987), aff'd 368 S.E.2d 386 (1988) 22

State v. Short, 368 So.2d 1078 (La. 1979), cert. denied, 444 U.S. 884 (1979) 21

State v. Taylor, 664 P.2d 439 (Utah 1983) 21

State v. Tidyman, 568 P.2d 666 (Or. App. 1977) 21

Staten v. Texas, 686 S.W.2d 268 (Tex. App. 1985) 22

State ex. rel. Pizza v. Strope, 560 N.E.2d 765 (Ohio 1990) 22

Swain v. Alabama, 380 U.S. 202 (1965) 27

Ulster County Court v. Allen, 442 U.S. 140 (1979) 9

United States v. Albertini, 472 U.S. 675 (1985) 9

United States v. Battista, 646 F.2d 237 (6th Cir. 1981), cert. denied, sub nom. *Peraino v. United States*, 454 U.S. 1046 (1981) 16

United States v. Easley, 927 F.2d 1442 (8th Cir, 1991), cert. denied, sub nom. ***Hunter v. United States***, 116 L.Ed.2d 158 (1991) 21

LIST OF AUTHORITIES – continued

Pages

United States v. Guarino, 729 F.2d 864 (1st Cir. 1984) 8

United States v. Peraino, 645 F.2d 548 (6th Cir. 1981), cert. denied, 454 U.S. 1046 (1981) 21

United States v. Petrov, 747 F.2d 824 (2d Cir. 1984), cert. denied, 471 U.S. 1025 (1985) 21

United States v. Pryba, 678 F.Supp. 1225 (E.D. Va. 1988), aff'd, 900 F.2d 748 (4th Cir. 1990), cert, denied, 112 L.Ed.2d 258 (1990) 21, 22

United States v. Various Articles of Obscene Merchandise, Schedule No. 1769, 600 F.2d 394 (2d Cir. 1979) 21

United States v. Various Articles of Obscene Merchandise Schedule No. 2102, 709 F.2d 132 (2d. Cir. 1983) 7, 21

Wall Distributing Inc. v. City of Newport News, 782 F.2d 1165 (4th Cir. 1986) 8

Washington v. Texas, 388 U.S. 14 (1967) 13

Womack v. United States, 509 F.2d 368 (D.C. Cir. 1974), cert. denied, 422 U.S. 1022 (1975) 21

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 7

UNITED STATES CONSTITUTIONAL PROVISIONS:

First Amendment 2, 8, 24

Fifth Amendment 2, 4

Sixth Amendment 2

LIST OF AUTHORITIES – continued

Pages

FEDERAL STATUTES:

18 U.S.C. § 2 3

18 U.S.C. § 921 10

18 U.S.C. § 1466 ..... *passim*

28 U.S.C. § 1254(1) 2

STATE STATUTES:

Selected Obscenity Laws of Various States ... 18, 19, 20

RULES:

Supreme Court Rule 13.1 and 13.4 2

CANADIAN DECISIONS:

Regina v. Prairie Schooner News Ltd. & Powers, 1 C.C.C. (2d) 251 (Man. C.A. 1970) 24

Towne Cinema Theatre Limited v. The Queen, 18 C.C.C. (3d) 193 (1985) 24

OTHER AUTHORITIES:

Devitt & Blackmar, *Federal Jury Practice and Instructions*, 1977 .....14, 16

Lentz, Comparison Evidence in Obscenity Trials, 15:1 Mich. J. of L. Ref. (Fall 1981), 45 24

134 Congressional Record 152, E. 3752 8

Schauer, *The Law of Obscenity*, Bureau of National Affairs 1976 .....15, 16

Weaver, *Handbook on the Prosecution of Obscenity Cases*, National Obscenity Law Center 1985 16

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Petitioners,

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UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Sixth Circuit United States Court of Appeals entered in this proceeding on January 10, 1992.

OPINIONS BELOW

The opinion of the Sixth Circuit United States Court of Appeals entered January 10, 1992, is an unreported decision and is reproduced as Appendix A. The decision of the Sixth Circuit denying Rehearing, and Rehearing En Banc, is also an unpublished decision, and is found as Appendix B.

JURISDICTION

The Order of the Sixth Circuit United States Court of Appeals was entered on January 10, 1992, with a timely filed Petition for Rehearing and Suggestion for Rehearing En Banc being denied by the Sixth Circuit on February 27, 1992. With this Petition for a Writ of Certiorari being filed within ninety (90) days of that latter date, this Court, therefore, has jurisdiction to review the decision of the Sixth Circuit pursuant to 28 U.S.C. §1254(1), and Sup. Ct. R.'s 13.1 and 13.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment 1

Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

Amendment 5

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . .

PROVISIONS FROM UNITED STATES CODE

The text of 18 U.S.C. §1466 is set forth in Appendix D.

STATEMENT OF THE CASE

On August 17, 1989, an FBI agent and a sergeant of the Memphis Police Department working with the FBI, within a few moments of each other, each purchased one copy of a certain videotape from Petitioner's Ellwest Stereo Theatres of Memphis, Inc.'s (hereinafter "Ellwest")

"Executive South" business premises located in Memphis, Tennessee. The acknowledged purpose of two law enforcement officials purchasing a copy of the same videotape was to bring the first prosecution pursuant to the new federal "obscenity" statute, 18 U.S.C. §1466; this prosecution being the "test case" of the constitutionality of that statute. Both films were purchased from Diane Wells, a sales clerk.

On September 27, 1989, Ms. Wells, together with Petitioners Charles Long (the President of Ellwest[1]), Rodney Skinner (the Secretary of Ellwest and the Manager of the "Executive South" location), and Ellwest were indicted for "engaging in the business" of selling or transferring obscene matter in violation of 18 U.S.C. §1466, and for aiding and abetting such allegedly illegal activity in violation of 18 U.S.C. §2. Prior to trial, Defendants filed numerous motions to have the indictments dismissed, predicated upon, among other things, the unconstitutionality of §1466. The trial court, the Honorable Julia S. Gibbons presiding, denied those motions in an Order filed March 19, 1990. Appendix E.

Following jury selection, trial commenced on April 30, 1990, and concluded on May 11, 1990. Defendant, Diane Wells, was acquitted by the jury of the aiding and abetting charge, and received a judgment of acquittal from the trial court with regard to the charge of being "engaged in the business" in violation of §1466. Defendants Ellwest, Long, and Skinner were all found guilty on the single count indictment pursuant to §1466 and §2, and, thereafter, filed Motions for Judgments of Acquittal and/or New Trial.

Subsequently, Skinner was sentenced to 18 months imprisonment and was fined $2,000.00. Long was sentenced to 20 months imprisonment and received a $7,500.00 fine. Long and Skinner both also received a further sentence of two years supervised release, a special

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[1] A business tax reporting form entered into evidence listed Long as the "owner" of Ellwest.

assessment in the amount of $50.00, and an order of Restitution in the amount of $21.50; an amount equal to one half of what the FBI spent on the purchase of the particular films at issue. Ellwest was fined $50,000.00. On January 14, 1991, the trial court denied Defendants' Motion for Judgments of Acquittal and/or New Trial. Appendix F.

On January 22, 1991, Ellwest, Long, and Skinner timely filed a Notice of Appeal to the Sixth Circuit, that appeal being denied in the manner as has been set forth above. On March 13, 1992, the Sixth Circuit, pursuant to motion of the Appellants, issued an Order staying its mandate 30 days to allow for the filing to this Court of a Petition for a Writ of Certiorari. Appendix C. This Petition follows.

REASONS FOR GRANTING THE WRIT

I.

THE ISSUES OF THE CONSTITUTIONALITY OF THE CHARGING STATUTE, 18 U.S.C. §1466, THE NEWEST OF THE FEDERAL OBSCENITY STATUTES, AND OF THE JURY CHARGE BELOW PURSUANT TO THAT STATUTE, ARE IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW WHICH SHOULD BE SETTLED BY THIS COURT, PARTICULARLY GIVEN THE FACT THAT BOTH THE TRIAL AND APPELLATE COURTS HERE ACKNOWLEDGED THAT THE STATUTE, AS WRITTEN, VIOLATES DUE PROCESS.

A. The mandatory rebuttal presumption as found within 18 U.S.C. §1466(b) violates the due process clause of the Fifth Amendment pursuant to *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Francis v. Franklin*, 471 U.S. 307 (1985).

18 U.S.C. §1466 (App. D) ascribes criminal penalties to those "engaged in the business" of selling or transferring obscene matter. The statute defines the term "engaged in the business" as being one who sells, transfers or offers to sell or transfer obscene matter and

"devotes time, attention, or labor to such activities, as a *regular course of trade or business,* with the objective of earning a profit . . . ". *Id.* Proof of being "engaged in the business" may be made, as was attempted in the prosecution below, by way of a rebuttable presumption:

> "The offering for sale of or to transfer, at one time, two or more copies of any obscene publication, or two or more of any obscene articles, or a combined total of five or more such publications and articles, ***shall*** *create a rebuttable presumption* that the person so offering them 'engaged in the business' as defined in Section (b)". 18 U.S.C. §1466(b) (emphasis added).

This rebuttable presumption, being mandatory and in shifting the burden of proof to the defendant, unquestionably violates due process. ***Sandstrom v. Montana***, 442 U.S. 510, 520-524 (1979); ***Francis v. Franklin***, 471 U.S. 307, 317 (1985). Late in the trial, Judge Gibbons finally acknowledged the unconstitutionality of this mandatory presumption, and concluded that she could not charge the jury with the statute as written. App. H, App. 36 and App. I, App. 39, 44.[2] In its consideration of this issue, the Sixth Circuit, although also noting the impermissible nature of the statutory mandatory presumption, declined to rule on the constitutionality of the statute, indicating that such a determination was unnecessary as a result of the trial court having instructed the jury with a "permissive inference" in lieu of the offending mandatory presumption. App. A, App. 4.

Since both courts below acknowledged the unconstitutionality of the charging statue as written, this Court should accept this case for review to determine the ultimate constitutionality of the statute, and to consider the

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[2] Although the trial court was declaring part of a new federal statute to be unconstitutional in its first judicial challenge, and even though she indicated that she ought to "write something on it", Judge Gibbons never did issue a written trial decision in this regard.

related issues set forth immediately below that flow from a determination that the statutory presumption is unconstitutional (those being the propriety of instructing the jury with a "permissive inference" in lieu of the offending presumption, and the inherent vagueness of the statute without – or even with – the standards that are set forth in the presumption), particularly given the fact that the decisions below acknowledging the unconstitutionality of the mandatory presumption are unpublished, and therefore provide no direction for other courts grappling with this facially apparent problem.

B. The trial court's instruction to the jury of a "permissible inference" in lieu of the unconstitutional mandatory presumption as found in the charging statute, violates due process as established by this Court in *Leary v. United States*, 395 U.S. 6 (1969).

Although Defendants had filed pretrial motions (which were denied) predicated upon the unconstitutionality of the charging statute, and with particular regard to the rebuttable presumption, during opening statement the trial court ordered defense counsel to show the jury a posterboard that contained the offending presumption. App. G, App. 34-35.

Confronted with the evidence at trial that two law enforcement officials had, within a few minutes of one another, each bought one copy of a single videotape from the Defendants' store (thereby fulfilling the requisites for the statutory presumption to apply), and with the problem of having ordered defense counsel to show the jury, in opening statement, the portion of the charging statute that she then later ruled to be unconstitutional, Judge Gibbons chose to charge the jury with a "permissible inference"[3], by instructing:

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[3] Judge Gibbons noted the ordering of defense counsel in opening statement to show the jury the "mandatory presumption" language to be paramount in her later decision to charge the jury with a "permissible inference" in lieu of the mandatory presumption. App. I, App. 43 and App. J, App. 45.

> "In considering whether a defendant is engaged in the business of selling or transferring obscene matter, if you find that a person sold or transferred at one time two or more obscene items or two or more copies of an obscene item, ***you may find*** that the person is engaged in the business of selling obscene matter. Whether you choose to draw such an inference is strictly up to you." App. K, App. 49 (emphasis added).

A permissive inference violates due process unless there is "substantial assurance" that the presumed fact is "more likely than not" to flow from the proven fact on which it is made to depend. ***Leary v. United States***, 395 U.S. 6, 36 (1969). In the circumstances here, there must therefore be "substantial assurance" that the Defendant can be deemed to be "*engaged in the business* of selling or transferring obscene matter" *as defined in the statute* (i.e., sells *obscene* materials "as a *regular course of trade or business*"), by the simple fact of having sold two copies of one obscene material. This assurance is lacking here.

Because all of the other expressive material at Defendants' store are presumptively protected expression, and are therefore presumed to be non-obscene, ***Schad v. Borough of Mount Ephraim***, 452 U.S. 61, 65-66 (1981), and because material may not be *presumed* to be obscene merely because it is "sexually explicit," "erotic," or "hardcore,"[4] it cannot be said with "substantial

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[4] See, for example, ***Jacobellis v. Ohio***, 378 U.S. 184, 191 (1964); ***Young v. American Mini Theatres***, 427 U.S. 50 (1976) at 73 (Powell, J., concurring), and at 84 (dissenting opinion of four Justices); ***United States v. Various Articles of Obscene Merchandise Schedule No. 2102***, 709 F.2d 132, 135 (2d 1983); ***Fantasy Bookshop, Inc. v. City of Boston***, 652 F.2d 1115, 1126 (1st Cir. 1981); ***Hart Bookstores, Inc. v. Edmistein***, 612 F.2d 821, 825 fn. 2 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980); ***Doe v. City of Minneapolis***, 693 F.Supp. 774, 779 fn. 11 (D. Minn. 1988), aff'd, 898 F.2d 612 (8th Cir. 1990); ***Avalon Cinema Corp.***

(Continued on following page)

assurance" that the simple sale of two copies of a single obscene material constitutes being "engaged in the business" of selling *obscene* material as a "*regular course* of trade or business." Under no stretch of the imagination can the sale of two copies of a single videotape, out of thousands of expressive materials in a store (all of which are constitutionally presumed to be non-obscene), fulfill the burden of proof under the statute of establishing that the Defendants are engaged "*primarily* in the *obscenity* business . . . ". 134 Congressional Record 152, E. 3752.

The instruction by the trial court below directly conflicts with the constitutionally required presumption that expressive materials are protected by the First Amendment *until proven otherwise*. See, for example, ***American Library Ass'n. v. Thornburgh***, 713 F.Supp. 469, 481 (D.D.C. 1989). Here, a determination that one is "engaged in the business" of selling or transferring obscene matter as a "*regular course*" of trade or business necessarily implies that a Defendant is selling obscene matter *over and above* the two copies of the single material charged here at trial. Thus, the "permissive inference" as instructed was violative of not only due process, but of the presumptive protections found within the First Amendment as well.[5]

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v. Thompson, 667 F.2d 659, 663 (8th Cir. 1981); ***Wall Distributing Inc. v. City of Newport News***, 782 F.2d 1165, 1168 (4th Cir. 1986); and ***United States v. Guarino***, 729 F.2d 864, 868 fn. 6, 870 (1st Cir. 1984).

[5] The trial court's conduct in instructing the jury with a "permissive inference," invented out of thin air and without any statutory basis, and in simply ignoring the statutory mandatory rebuttal presumption, further amounts to impermissible judicial legislating. Construing legislation so as to save it against constitutional attack does not grant the federal courts authority to judicially rewrite it. ***Heckler v. Mathews***, 465 U.S. 728, 741-742 (1984), citing ***Aptheker v. Secretary of State***, 378 U.S. 500, 515 (1964), quoting ***Scales v. United States***, 367 U.S.

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This Court should, therefore, accept this case for review to determine whether the unique approach of the trial court below, in simply ignoring the mandatory (albeit unconstitutional) presumption as written in the charging statute and, rather, charging the jury with a "permissive inference," is a constitutionally permissible method of saving this statute from total constitutional invalidation. The likelihood of wide-scoped use of this statute as a prosecutorial tool following resolution of this action, with all the attendant difficulties of attempting to apply this statute in a constitutional manner (as is illustrated by this case), warrants such review.

C. The charging statute, 18 U.S.C. §1466, is unconstitutionally vague in failing to provide sufficient standards to determine if one is "engaged in the business" of selling or transferring obscene matter.

Statutes which are vague, lack sufficient guidelines, are not subject to reasonable interpretation by common men, or which invite arbitrary enforcement, inherently deny due process and are therefore unconstitutional. ***Grayned v. City of Rockford***, 408 U.S. 104, 108 (1972); ***Kolender v. Lawson***, 461 U.S. 352, 358 (1983). Stricter standards of vagueness are applied to statutes that may have an inhibiting effect on speech. ***Hynes v. Mayor of Oradell***, 425 U.S. 610, 620 (1976).

Particularly without the unconstitutional mandatory presumption, the charging statute is impermissibly

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203, 211 (1961). See also ***United States v. Albertini***, 472 U.S. 675, 680 (1985). Given the unconstitutionality of the mandatory rebuttal presumption, it is therefore for Congress, not any court, to rewrite the statute. ***Blount v. Rizzi***, 400 U.S. 410, 419 (1971). This, therefore, is unlike the circumstance as found in ***Ulster County Court v. Allen***, 442 U.S. 140 (1979), where the trial court, there, in applying an *ambiguous* statutory presumption, charged the jury with a "permissive inference." ***Id.***, at 157-167. Here, the Court must "take the statute as [it finds] it." ***Anderson v. Wilson***, 289 U.S. 20, 27 (1933).

vague in its use of the terms "engaged in the business" and "as a regular course of trade or business."[6] There are simply no standards by which to determine if those circumstances have been established. The Sixth Circuit concluded otherwise, by noting that it had already considered, and rejected, a challenge to the phrase "engaged in the business" in the context of dealing with firearms (18 U.S.C. §921). App. A, App. 6.

Yet, there is a momentous constitutional distinction, not acknowledged by the Sixth Circuit, between firearms and expressive material. The expressive material at issue here is presumptively protected, and is assumed to be non-obscene, until, and only until, a trier of fact adjudicates it to be obscene. Therefore, no material that has not been adjudicated to be obscene can be used in the calculus of determining whether or not a defendant is "engaged in the business" of selling or transferring *obscene* matter. However, a firearm is *always* a firearm, and can therefore always be utilized in determining whether or not there is a violation of the federal firearms statute. The two statutes are, therefore, simply not analogous from a constitutional standpoint.

Exemplifying the inherent vagueness of the charging statute is the simple fact that even before trial, the court was not able to reconcile who may be able to be prosecuted under the statute.

> "The reference to a profit motive, however, suggests that Congress *may have* intended that the statute apply *to only those with a financial interest in the business.*" App. E, App. 27 (emphasis added).

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[6] It should be noted that the definition of the term "engaged in the business" as found in subsection (b) of 18 U.S.C. §1466 only purports to define that term "as used in [that distinct] subsection" (i.e. *subsection (b)*). Therefore, by the language of the statute itself, the term "engaged in the business" in subsection (a) remains undefined, and is thus vague and ambiguous.

Then again in ruling on Motions for Judgments of Acquittal, the court indicated:

> "I think I indicated, at least in the order that I did in the Motion to Dismiss, that I thought that there was a *real question* about whether the statute on its face applied to someone who was simply an employee . . . ." T.pp. 1041-1042 (emphasis added).

These comments are particularly enlightening when it is recognized that while the trial court granted a Motion for Judgment of Acquittal on behalf of Defendant Diane Wells (who was identified by the law enforcement officers as being the individual who actually sold the videotapes in question) on the charge pursuant to 18 U.S.C. §1466, the court refused to grant a similar motion on behalf of Defendant Skinner who, like Ms. Wells, was not shown to have any ownership interest in the business (with Mr. Skinner, of course, then being convicted). As the statute makes no distinction between a simple store clerk and non-ownership management, there was no basis to grant a Motion for Judgment of Acquittal on behalf of Defendant Wells, but not in favor of Defendant Skinner. This disparity of decisions well illustrates the vagueness of the charging statute.

In addition, while the criminal proscriptions of §1466 only apply to those engaged in the business of selling or transferring *obscene* matter (as opposed to simply "adult," or "sexually explicit"), the statute fails to provide any standards as to what percentage of Defendants' "regular" trade or business must necessarily be devoted to the sale or transfer of *obscene* matter, before criminal proscription applies. Is 5% sufficient, or, maybe, 10%? Must it be a preponderance or a majority? The statute is simply silent. Particularly without the sole criteria as found within the unconstitutional mandatory presumption ("two copies"), the statute is devoid of any standards whatsoever by which to determine whether or not one is "engaged in the business" of selling or transferring obscene matter as a "*regular course* of trade or business."

Yet, even without severing the unconstitutional presumption, the statute is inherently vague. Since the statutory presumption is "rebuttable," there must be an ability to rebut

the presumption, *even assuming that a Defendant may have sold two copies of a videotape later determined to be obscene.* The ability to rebut this presumption is established in the legislative history (see 134 Congressional Record 152, E. 3752), with this ability to rebut being relied upon by the trial court as a basis in its pretrial decision to uphold the constitutionality of the mandatory presumption. App. E, App. 24.

However, the statute contains no criteria as to what a Defendant may be able to prove to rebut the presumption, assuming, arguendo, establishment of the sale of two copies of an obscene material. In fact, if the circumstances at trial here (where it was unequivocally established that not a single other item at Defendants' store had been adjudicated obscene and that all of the other materials therefore were presumed to be non-obscene) is insufficient to rebut the presumption, then the "rebuttable" nature of the presumption is truly meaningless, for there is then no ability at all to refute the presumption or inference of being "engaged in the business." The presumption is then, for all intents and practical purposes, *irrebuttable,* and therefore, unconstitutional as well. See, ***Francis***, 471 U.S. at 314.

II.

THE DETERMINATION OF THE TRIAL COURT TO INSTRUCT THE JURY WITH A "PERMISSIVE INFERENCE," AFTER THE COURT HAD ALREADY INDICATED THAT THE MANDATORY PRESUMPTION AS FOUND WITHIN THE CHARGING STATUTE WAS UNCONSTITUTIONAL AND WOULD THEREFORE NOT BE CHARGED TO THE JURY, AND FOLLOWING THE RESTING OF THE DEFENDANTS' CASE IN CHIEF, DEPRIVED THE DEFENDANTS OF THEIR ABILITY TO PRESENT EVIDENCE TO REBUT THE PERMISSIVE INFERENCE IN VIOLATION OF THEIR FIFTH AND SIXTH AMENDMENT RIGHTS.

The trial court charged the jury with a "permissive inference," even though she had initially indicated

during Motions for Judgment of Acquittal, and thus *prior* to the commencement of Defendants' proofs, that she would simply sever out the unconstitutional portion of the statute and would not charge the jury "about the application of any presumption," (App. H, App. 36); even though prior to the conclusion of Defendants' case her inclination at that point was "to say nothing about the two sales," (App. I, App. 44); and even though she acknowledged that the question of whether a permissive presumption should be given in the jury instructions was "a real difficult one." (T.p. 1663). Yet, *after* the Defendants had rested, the court *then* decided to instruct pursuant to a "permissible inference," (App. J, App. 45). This late decision to provide a "permissible inference" jury instruction had the undeniable effect of depriving Defendants of their ability to submit evidence to counter or rebut the inference.

The confrontation and compulsory process clauses of the Sixth Amendment constitutionalize "the right in an adversarial criminal trial to make a defense as we know it." ***Faretta v. California***, 422 U.S. 806, 818 (1975), citing ***California v. Green***, 399 U.S. 149, 176 (1970) (Harlan J., concurring). Thus, a defendant in a criminal prosecution has the right, at a minimum, to "put before the jury evidence that might influence the determination of guilt." ***Pennsylvania v. Ritchie***, 480 U.S. 39, 56 (1987). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." ***Chambers v. Mississippi***, 410 U.S. 284, 302 (1973). This right is so fundamental that it is implicitly incorporated into fundamental due process. ***Chambers, supra***, at 294; ***Washington v. Texas***, 388 U.S. 14, 19 (1967).

Prior to trial, Defendants had specifically indicated to the trial court their intent of submitting into evidence all the other materials sold at the Executive South location, as a method of attempting to establish, even assuming the videotape at trial was obscene, that Defendants were not "engaged in the business" of selling or transferring obscene matter as a "regular course of trade or business." This position was buttressed by the trial court's Order of

March 13, 1990 denying motions to dismiss, where the court indicated that it found the presumption as written in the statute not to be unconstitutional, since Defendants *had the ability to rebut the evidence* by **proving** that they were in the trade or business of "lawful books, magazines, audio or video products . . . ". App. E, App. 24. Given the court's determination at trial holding the mandatory presumption to be unconstitutional, Defendants indicated to the trial court that they would not be submitting all of the other store materials, and they did not. App. H, App. 37. In fact, given the court's late ruling, the Defendants were precluded from presenting any evidence to refute this inference.

III.

THE DECISION OF THE SIXTH CIRCUIT AFFIRMING THE PROPRIETY OF CERTAIN JURY INSTRUCTIONS REGARDING "COMMUNITY STANDARDS" AND "PATENT OFFENSIVENESS," IS IN CONFLICT WITH DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS OF APPEALS, AND OTHER STATE COURTS OF LAST RESORT, AS WELL AS NUMEROUS STATE OBSCENITY STATUTES. CORRECTING CONFUSION BETWEEN THE CONCEPTS OF "CONTEMPORARY COMMUNITY STANDARDS" AND "PATENT OFFENSIVENESS," TOGETHER WITH ARTICULATING A SINGLE AND CONSTITUTIONAL STANDARD OF "PATENT OFFENSIVENESS," ARE IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

In its charge to the jury, the trial court below defined "contemporary community standards," in language generally consistent with §62.07 of Devitt & Blackmar, *Federal Jury Practice and Instructions*, 1977, at 534. Particularly, the jury was instructed that:

> "*Contemporary community standards* are set by what is in fact *accepted* in the community as a whole . . . ". App. K, App. 52 (emphasis added).

Defendants timely objected to this jury instruction, and also submitted appropriate proposed jury instructions in this area that were denied by the trial court.

A. Defining "contemporary community standards" in relation to the prurient appeal element of the obscenity test by a standard of what is "accepted," establishes an obscenity standard in violation of the First Amendment and at odds with this Court's decisions in *Miller v. California*, 413 U.S. 15 (1973) and its progeny.

While *both* prurient appeal and patent offensiveness are to be judged in relation to community standards, ***Miller v. California***, 413 U.S. 15, 24 (1973); ***Smith v. United States***, 431 U.S. 291, 301 (1977), the concept of *"acceptance"* (if it is even an appropriate constitutional standard-see discussion, ***infra***) is, however, *only* applicable to the *patent offensiveness* prong of the obscenity test. "Acceptance" has no relevance or relation whatsoever to evaluating whether material appeals to the prurient interest. Material either appeals to the prurient interest, or it does not.

As noted by Professor Frederick Schauer in his treatise of *The Law of Obscenity*, 1976,[7] the purpose of utilizing the concept of "contemporary community standards" in evaluating obscenity is because " . . . prevailing concepts of decency and morality change with time and that *therefore what is obscene at one time and place may not be obscene at another.*" ***Id.***, at 117 (emphasis added). It is to insure that jurors apply "an external standard, rather than their own personal views," and that they determine the impact of the material upon the average person in the community by *"present-day standards."* ***Id.*** (emphasis added).

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[7] Professor Schauer's works in the area of obscenity have been cited for approval by this Court on numerous occasions. See, for example, ***Smith***, 431 U.S. at 301 and ***Pope v. Illinois***, 481 U.S. 497, 500 (1987).

Therefore, the application of the "contemporary community standards" test to the "prurient appeal" prong is simply to provide a temporal and geographic context to that evaluation. The concept of "acceptance" is simply foreign to the calculus of this factual determination. Yet, it is apparent, probably because numerous authoritative sources (such as the *Devitt & Blackmar* treatise) confuse the concepts of "prurient appeal," "patent offensiveness" and "community standards,"[8] that both state legislatures and appellate courts regularly juxtapose these separate and distinct issues.[9]

At trial, counsel requested that the concept of "acceptance" with regard to contemporary community standards be limited in the jury charge to the "patent offensiveness" prong of the obscenity test. Apparently understanding this issue, the trial court attempted to modify the pattern instruction by deleting a portion that discussed "an unacceptable appeal to the prurient interest." However, the jury charge still required contemporary community standards to be evaluated by what is *accepted*, and further required prurient interest to be evaluated with regard to such contemporary community standards (i.e., judged by "what is in fact *accepted* in the community . . . "). App. K, App. 51-53.

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[8] See also, for example, Schauer, ***supra***, at 306-307 [also, like *Devitt & Blackmar*, applying in proposed jury instructions an "acceptance" standard to the determination of "contemporary community standards" as opposed to "patent offensiveness"]; and Weaver, *Handbook on the Prosecution of Obscenity Cases*, National Obscenity Law Center 1985, at 109 [same].

[9] See, for example, Idaho §18-4101B; N.D. Cent. Code §12.1-27.1-10(10); S.D. Codified Laws Ann. §22-24-27(12); ***United States v. Battista***, 646 F.2d 237, 245-246 (6th Cir. 1981), cert. denied, sub nom. ***Peraino v. United States***, 454 U.S. 1046 (1981); ***Collins v. Superior Court***, 787 P.2d 1042, 1048 (Az. 1986); ***Smith v. United States***, 505 F.2d 824, 828 (6th Cir. 1974) [citing an almost identical jury charge to the one at issue here derived from *Devitt & Blackmar*, ***supra***]; and ***People v. Nelson***, 410 N.E.2d 476, 478 (Ill. App. 2d Dist. 1980).

Thus, the jury was left with the clear impression that the first prong of the obscenity test was to evaluate whether there was an *acceptable or unacceptable appeal* of the film, or, quite possibly, given the "prurient appeal" jury instruction (see App. K, App. 51), whether the "purpose" of the material was either an acceptable or unacceptable appeal to the prurient interest, *regardless of whether or not there actually was an appeal to the prurient interest*. If this were a proper statement of the law, and "acceptance" was indeed relevant to the prurient appeal prong, a Defendant could raise an argument that even if material did, in fact, appeal to the prurient interest, such material would not offend the first element of the ***Miller*** test if the appeal was found to be "acceptable." Such concepts simple finds no support in obscenity law, and are contrary to this Court's pronouncements in ***Miller*** and its progeny. The mistaken reliance by state legislatures as well as trial and appellate courts upon these learned, but misguided, treatises warrant this Court to accept this case for review to provide clear guidance in this area of First Amendment jurisprudence.

B. The failure of this Court to articulate a single and unequivocal constitutional standard for determining "patent offensiveness," has resulted in conflicting legislative and judicial definitions for that term, many of which violate core First Amendment protections.

The astute comments of Professor Schauer made in 1976 regarding the determination of "patent offensiveness" are nonetheless applicable today:

> "Nowhere in the Supreme Court cases is there any reference to dictionary definitions of patent offensiveness . . . " ***Schauer, supra,*** at 103-104.

Because of the lack of direction from this Court as to the operationalization of "patent offensiveness," confusion has ensued not only in federal and state courts, but in the state legislatures as well which have attempted to draft obscenity laws that comport with constitutional protections.

This Court's use of the terms "tolerance" and "acceptance" in obscenity jurisprudence, particularly in the decision of ***Smith***, 431 U.S. 291 (where this Court, at one place in its opinion indicates that contemporary community standards must be "*applied* by juries in accordance with their own understanding of the *tolerance* of the average person . . . ," *id.*, at 304, yet at another place cites to a jury instruction similar to the instruction at issue here involving the term "acceptance," *id.*, at 297-298), has created such confusion that review by this Court of this issue is surely now warranted.[10]

This confusing precedent has resulted in state legislatures defining patent offensiveness variously as a standard of "tolerance,"[11] or "decency" (akin to an "acceptance" standard),[12] or in a host of other

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[10] ***Smith*** is not the only decision of this Court that seemingly refers to, simultaneously, standards of "tolerance" and "acceptance." See, for example, ***Miller***, 413 U.S. at 32, 33 n. 13 (1973); ***Manual Enterprises, Inc. v. Day***, 370 U.S. 478, 482, 488, 490 (1962); and ***Pinkus v. United States***, 436 U.S. 293, 296, 304 (1978). In fact, even Schauer's treatise similarly juxtaposes the concepts of "tolerance" and "acceptance." Compare, Schauer, ***supra***, at 103-104 (arguing for a "tolerance" standard of patent offensiveness), with 306-307 (continually referring to an "acceptance" standard, although in the inappropriate context, as argued, ***supra***, regarding "contemporary community standards" as opposed to "patent offensiveness").

[11] Colo. Rev. Stat. §18-7-101(4).

[12] R.I. Gen. Laws §11-31-1; N.D. Cent. Code §12.1-27.1-01(8); and Tex. Code Ann. §43.21(a)(4). See also S.C. Code Ann. §16-15-305(c)(2), and text of it in fn. 13, ***infra***, and S.C. Code Ann. §16-15-280(6), allowing in evidence of "acceptance" of the material throughout the state (fn. 15, ***infra***). Yet, a standard of "decency" seems to run afoul of this Court's recent decision in ***Sable Communications v. FCC***, 492 U.S. 115, 126 (1989), that indicated that "[s]exual expression which is *indecent* but not obscene is protected by the First Amendment . . . ".

ways.[13] Many states simply leave this term undefined.[14] In addition, a number of state statutes indicate that

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[13] A number of statutes use language of material going "substantially beyond the customary limits of candor," which is derived from this Court's decisions of ***Jacobellis***, 378 U.S. 184, and ***Roth v. United States***, 354 U.S. 476, 487 n. 20 (1957), which in turn are derived from the American Law Institute's Model Penal Code §407.10(2). See, for example, Neb. Rev. Stat §28-814(2) [regarding jury instructions]; Tenn. Code Ann. §39-17-901(ii); Va. Code Ann. §18.2-372 [But see fn. 15, ***infra***, where the statute also allows evidence of public "*acceptance*" of the material, or similar material, to be admitted at trial]. See also fn. 16, ***infra***, regarding Idaho Code §18-4101B. South Dakota finds patent offensiveness when material "affronts contemporary community standards relating to the description or representation of sado-masochistic abuse or sexual conduct." S.D. Codified Laws Ann. §22-24-27(10)(b). But see fn. 16, ***infra***. South Carolina, on the other hand, throws in the kitchen sink, defining patent offensiveness as "obviously and clearly disagreeable, objectionable, repugnant, displeasing, distasteful, or obnoxious to contemporary community standards of decency, and propriety within the community." S.C. Code Ann. §16-15-305(c)(2).

[14] Ala. Code §13A-200.1(1)(b); Ariz. Rev. Stat. Ann. §13-3501(2)(b); Ark. Code Ann. §5-68-302(4)(A); Cal. Code §311; Conn. Gen. Stat. §53a-193(a); Del. Code Ann. tit. 11 §1364(2); Fla. Stat. Ann. §847.001(7)(b); Ga. Code Ann. §26-2101(b)(3); Ind. Code §35-49-2-1(2); Kans. Stat. Ann. §21-4301(3)(ii); Ky. Rev. Stat. Ann. §531.010(3)(b); La. Rev. Stat. Ann. §14:105(A)(3); Me. Rev. Stat. Ann. tit. 17 §2911.1(D)(2); Md. Ann. Code of 1957 art. 27 §418; Mass. Gen. Laws Ann. Ch.272 §31; Mich. Comp. Laws §752.362(5)(c); Minn. Stat. Ann. §617.241(a) and (a)(ii); Neb. Rev. Stat. §28-807(10) [But see fn. 13, ***supra***]; Nev. Rev. Stat. §201.235(4)(c); N.H. Rev. Stat. Ann. §650.1(iv) [But see fn. 15, ***infra***]; N.J. Stat. Ann. §2C:34-2a(1)(a); N.M. Stat. Ann. §30-38-1(B)(2); N.Y. Obscenity Law §235.00(1); N.C. Gen. Stat. §14-190.1(b)(1); Ohio Rev. Code Ann. §2907.01 [Ohio statutory law does not even include the element of

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"acceptance" of the material (or even similar material) in the community is to be admissible, although without indicating to which prong of the ***Miller*** test of obscenity this evidence would be relevant.[15] Yet, other states juxtapose the various elements of the obscenity test, by imposing the standards of acceptance, decency, or "going substantially beyond the limits of candor" improperly onto the elements of prurient appeal or community standards.[16]

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"patent offensiveness" – but see ***State v. Burgun***, 384 N.E.2d 255 (Ohio 1978), reading the Ohio Obscenity Statute *in para materia* with the three prong ***Miller*** test]; Okla. Stat. Ann. tit. 21, §1024.1(1) and (2)(b) [But see fn. 16, *infra*]; Pa. Cons. Stat. Ann. §5903(b); Utah Code Ann. §76-10-1203(1)(b); Wash. Rev. Code Ann. §7.48A.010(2)(b); W.Va. Code §61-8A-1(7)(b); Wis. Stat. Ann. §944.21(2)(c)2; and Wyo. Stat. §6-4-301(a)(iii)(B).

[15] Ill. Ann. Stat. Ch. 38 para. 11-20(c)(4)(Smith – Hurd 1961) [But see ***Nelson***, 410 N.E.2d at 478 indicating that "acceptance" is a function of patent offensiveness]; Iowa Code §728.9; Mo. Ann. Stat. §573.050.1(3); Mont. Code Ann. §45-8-201(3)(c); N.H. Rev. Stat. Ann. §650.5(iii); S.C. Code Ann. §16-15-280(6); Va. Code Ann. §18.2-384(8)(b).

[16] See, for example, Idaho Code §18-4101B [Utilizing the standard of going "substantially beyond" as an element of prurient appeal, while leaving patent offensiveness undefined in the statute – see Idaho Code §18-4101(A)(2)]; N.D. Cent. Code §12.1-27.1-01(10) [utilizing the "substantially beyond" standard as an element of *prurient appeal*, while defining patent offensiveness as a standard of *decency* – N.D. Cent. Code §12.1-27.1-01(8)]; Okla. Stat. Ann. tit. 21, §1021 and 1040.12 [Generally referring to material "offensive to decency"]; S.D. Codified Laws Ann. §22-24-27(12) [Imposing the "substantially beyond" language on the element of prurient appeal, while defining "patent offensiveness" otherwise-see fn. 13, ***supra***.]. See also fn. 9, ***supra***.

Similarly, judicial decisions across the United States have reached disparate conclusions, some adopting, either explicitly or in dicta, a standard of "tolerance,"[17] or a standard of "acceptance,"[18] with other cases finding (or implying) the concepts of "tolerance" and "acceptance" (or "decency") to be interchangeable and synonymous from a constitutional standpoint[19], while yet others

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[17] ***People v. Seven Hundred Thirty Five E. Colfax Inc.***, 697 P.2d 348, 360-361 (Colo. 1985), ***Commonwealth v. United Books Inc.***, 453 N.E.2d 406, 409-410 (Mass. 1983); ***State v. Cimino***, 366 A.2d 1168, 1170 (Ct. App. 1976); ***United States v. Various Articles of Obscene Merchandise, Schedule No. 1769***, 600 F.2d 394, 406 (2d Cir. 1979): ***Red Bluff Drive-In, Inc. v. Vance***, 648 F.2d 1020, 1028-1029 (5th Cir. 1981), cert. denied, sub. nom. ***Theatres West, Inc. v. Holmes***, 455 U.S. 913 (1982); ***Leech v. American Booksellers Assn., Inc.***, 582 S.W.2d 738, 749 (Tn. 1979); ***Collins***, 787 P.2d at 1048; ***State v. Taylor***, 664 P.2d 439, 448-449 (Utah 1983); ***Home Box Office, Inc. v. Wilkinson***, 531 F.Supp. 986, 1001 (D. Utah, C.D. 1982); ***Albright v. State***, 501 N.E.2d 488, 493-494 (Ind. App. 4th Dist. 1986); ***Community Television of Utah, Inc. v. Roy City***, 555 F.Supp. 1164, 1171-1172 (D. Utah 1982); ***Goldstein v. Allain***, 568 F.Supp. 1377, 1386 (N.D. Miss. 1983); ***United States v. Various Articles of Obscene Merchandise Schedule No. 2102***, 709 F.2d 132, 136 (2d Cir. 1983); ***United States v. Peraino***, 645 F.2d 548 (6th Cir. 1981), cert. denied, 454 U.S. 1046 (1981), ***Skyywalker Records, Inc. v. Navarro***, 739 F.Supp. 578, 588-589 (S.D. Fla. 1990); ***State v. Tidyman***, 568 P.2d 666, 673 (Or. App. 1977).

[18] See, for example, ***United States v. Pryba***, 678 F.Supp. 1225, 1230 (E.D. Va. 1988), aff'd, 900 F.2d 748, 759 (4th Cir. 1990), cert. denied, 112 L.Ed.2d 258 (1990).

[19] ***Sedelbauer v. State***, 428 N.E.2d 206, 210-211 (Ind. 1981), cert. denied, 405 U.S. 1035 (1982); ***Womack v. United States***, 509 F.2d 368, 379 (D.C. Cir. 1974), cert. denied, 422 U.S. 1022 (1975); ***United States v. Petrov***, 747 F.2d 824, 831 (2d Cir. 1984), cert. denied, 471 U.S. 1025 (1985); ***State v. Short***, 368 So.2d 1078, 1082 (La. 1979), cert. denied, 444 U.S. 884 (1979); ***United States v. Easley***, 927 F.2d 1442, 1446-1447 (8th Cir. 1991), cert. denied, sub nom. ***Hunter v. United States***, 116 L.Ed.2d 158

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find just the opposite.[20] In addition, some cases find a standard of "decency" to be constitutional[21], with other courts finding that it is not.[22]

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(1991) [rejecting ***Leech***, 582 S.W.2d 738 and ***Collins***, 787 P.2d 1042]; ***Andrews v. State of Texas***, 652 S.W.2d 370, 388 (Tex. Crim. App. 1983); ***Asaff v. Texas***, 799 S.W.2d 329, 331-334 (Tex. App. 1990), review refused; ***Hoover v. Byrd***, 801 F.2d 740, 741 (5th Cir. 1986); ***Saliba v. State***, 475 N.E.2d 1181, 1186 (Ind. App. 2 Dist. 1985); and ***Dunlap v. Arkansas***, 728 S.W.2d 155, 160 (Ark. 1987), cert. denied, 484 U.S. 852 (1987). However, it should be noted that a number of these decisions have found the two concepts interchangeable by finding that it was not error to have instructed the jury with a standard of "acceptance" as opposed to the defense requested standard of "tolerance." See also ***State ex. rel. Pizza v. Strope***, 560 N.E.2d 765, 766, 770 (Ohio 1990), acknowledging that a community survey of the "acceptance *and tolerance*" of sexually explicit materials was "the most relevant and probative evidence presented" on the issue of obscenity at trial.

[20] ***Staten v. Texas***, 686 S.W.2d 268, 271 (Tex. App. 1985) [finding "tolerance" a "more lenient" concept than "decency"], but compare directly, ***Olson v. Leeke***, 744 F.2d 1061, 1062 (4th Cir. 1984), cert. denied, 471 U.S. 1053 (1985) ("decency" and "tolerance" *are* comparable)]; ***Leech***, 582 S.W.2d at 748; ***State v. Roland***, 362 S.E.2d 800, 804 (N.C. App. 1987), aff'd 368 S.E.2d 386 (1988); ***Community Television of Utah, Inc. v. Roy City***, 555 F.Supp. 1164, 1170-1172 (D. Utah 1982), [tolerance is neither public nor personal approval]; ***Hoover***, 801 F.2d at 741-742 [tolerance and decency not the same]; ***People v. Ford***, 773 P.2d 1059 1066 (Colo. 1989) ["tolerance" is different than *both* "decency" and "acceptance"]; and ***Pryba***, 678 F.Supp. at 1230 [it is "axiomatic" that "tolerance" and "acceptance" are different].

[21] ***Andrews***, 652 S.W.2d at 377-382; and ***Hoover***, 801 F.2d at 741-742.

[22] ***Goldstein***, 568 F.Supp. at 1386; ***Home Box Office***, 531 F.Supp. at 1001.

The disparate state legislative statutes and judicial decisions give clear indication that confusion is rampant regarding the operationalization of the constitutional concept of "patent offensiveness," thereby requiring direction from this Court.

C. The proper constitutional standard for patent offensiveness, consistent with First Amendment protections, is not that which is personally acceptable or approved, but, rather, what the average person, applying contemporary community standards, would find to be unacceptable for *others* in the community to see; i.e. what the community would not "tolerate" others to see or do.

Petitioners assert that "tolerance" is the proper standard for patent offensiveness. This Court has continually indicated that expression need not meet standards of "acceptability" to merit protection under the First Amendment. See, for example, *Miller*, 413 U.S. at 24-25, citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); and *Kingsley International Pictures Corporation v. Regents of N.Y.U.*, 360 U.S. 684, 689 (1959). The concept of "tolerance" also comports with the Model Penal Code's standard (approved by this Court in *Jacobellis* and *Roth*) of going "*substantially* beyond the customary limits of candor." In addition, if the standards of "tolerance" and "acceptance" are truly analogous from a constitutional standpoint (such that it is not error to charge a jury with "acceptance" as an operational definition of patent offensiveness), the two standards must connote the same ideal. Yet, a standard of "acceptance" may be operationalized in a multitude of different ways, thereby resulting in the confusion as referenced, *supra*.

Defendants requested at trial that if the court was going to define patent offensiveness as a standard of "acceptance," that the court further instruct the jury that

that term did not mean *personal* acceptance or approval; such a concept being violative of First Amendment protections. See, for example, ***Saliba v. State***, 475 N.E.2d at 1186, citing ***Pinkus***, 436 U.S. 293; and ***Leech***, 582 S.W.2d at 748. This request was made because "[a]cceptability is not a self-defining concept; it could mean anything on a continuum from whole-hearted community approval to indifferent toleration." ***Lentz***, *Comparison Evidence in Obscenity Trials*, 15:1 Mich. J. of L. Ref. (Fall 1981), 45 at 66. A simple standard of just "acceptance" is therefore not clear. Yet, the trial court here failed to further define "acceptance" (as requested by Defendants), and the Sixth Circuit failed to address this appellate issue at all, although properly raised.

It is interesting that in Canada's criminalization of obscenity, a "community standards" test is also utilized. That community standards test is a standard of "tolerance," although the Canadian courts have generally noted, similar to many American courts, that the concepts of "acceptance" and "tolerance" are analogous. See, for example, ***Regina v. Prairie Schooner News Ltd. & Powers***, 1 C.C.C. (2d) 251, 269 (Man. C.A. 1970). Yet, the Canadian Supreme Court has, with a lone dissent, set forth a clear and unequivocal test for this standard of tolerance/acceptance:

> "The cases all emphasize that it is a standard of tolerance, not taste, that is relevant. *What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it.*" ***Towne Cinema Theatre Limited v. The Queen***, 18 C.C.C. (3d) 193, 205 (1985).

The standard as enunciated by the Canadian Supreme Court appears to be the same standard that has been applied by the majority in American jurisprudence (whether it be technically of a standard of "acceptance"

or "tolerance"), and which should now, because of the diversity of opinion, be explicitly set forth by this Court.[23]

In addition, it is clear that this was *not* the standard of "acceptance" as understood by the trier of fact in the prosecution below. The trial court's failure to charge the jury that "acceptance" was not to be determined by a standard of "personal" acceptance or approval, allowed the jury to convict the Defendants pursuant to an unconstitutional standard of obscenity, and clearly prejudiced the Defendants' case in chief.

Prior to trial, Defendants filed a motion requesting the court to set forth the definition of patent offensiveness, so that certain surveys of the community standards could be conducted. The trial court, however, failed to rule on that motion, and the studies therefore were conducted by utilizing questions that discussed both "acceptance" and "tolerance," but did not contain questions involving a determination of *personal* acceptability. Rather, the "acceptability" questions asked the participants as to what they felt was acceptable in the community for *others* to do or see. App. L, App. 54-55. The cross-examination of Defendants' expert witnesses was

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[23] In addition to the numerous disparate citations, ***supra***, compare for example, ***Saliba***, 475 N.E.2d at 1186 ["We must emphasize the majority of the community need not desire to view sexually explicit materials in order to establish community acceptance or tolerance of such materials"], and ***Nelson***, 410 N.E.2d at 478 [question of whether individuals feel "it would be acceptable to the average adult in Illinois to see or buy sexually explicit materials "held to be relevant to the "acceptance" material]; with ***Commonwealth v. Trainor***, 374 N.E.2d 1216, 1222 (Mass. 1978) ["Perhaps many people would not object to others seeing such material, although they themselves regard such material as patently offensive"], and ***Flynt v. State***, 264 S.E.2d 669, 672 (Ga. App. 1980), cert. denied, 446 U.S. 981 (1980) [same].

directed to particularly establish to the jury that the surveys had utilized an inappropriate legal standard, and were thus irrelevant. See, for example, App. N, App. 62-65, 67-70; and App. O, App. 75.

The trial court's failure to clarify this issue, in turn, led to the prosecutor devoting almost the entirety of his closing argument to attacking the defense evidence for having utilized what he considered to be a standard of "tolerance" (irrespective of the term "acceptance" being found in some of the questions), instead of a standard of *personal* "acceptance." See, for example, App. P, App. 76-85. The confusing nature as to the proper conceptualization of "patent offensiveness," together with the unquestionable prejudice to Defendants case in chief wrought by this confusion, warrants this Court to accept this case to clarify this last remaining undefined element of obscenity jurisprudence.

IV.

THE TRIAL COURT IMPERMISSIBLY IMPINGED UPON THE DEFENDANTS' RIGHT OF PREEMPTORY CHALLENGES IN REQUIRING DEFENDANTS TO UTILIZE PREEMPTORY CHALLENGES ON VENIREPERSONS WHO UNQUESTIONABLY SHOULD HAVE BEEN STRICKEN FOR CAUSE.

The trial court refused to strike a number of venirepersons for cause who were unquestionably biased, exemplified by venireperson Caldwell. Following some preliminary questions, Mr. Caldwell was given a printed "juror questionnaire," where, when asked whether he could follow the law and the judge's instruction, notwithstanding any personal views, responded:

> "The law is for the criminal but you let me do something like this and the law would hang me for something like this. *Should not mix inter-racial*[24] *in movies or anything else. What's this*

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[24] The videotape in question involved primarily scenes of inter-racial sexual conduct.

> world coming to. It ought to be against the law of this land for any kind of dirty movie made in this country." App. Q, App. 96 (emphasis added).

Mr. Caldwell also responded that he would be personally offended because of the inter-racial sexual conduct in the film, App. Q, App. 94, that "this kind of stuff need not be shown anywhere in this country . . . ", App. Q, App. 93-94, and, most importantly, he specifically indicated that because of the offensiveness of the material as described to him, he could not sit and render a fair and impartial verdict. *Id.*

Upon further oral examination by the court, Mr. Caldwell then indicated *three times* that he could not be fair and impartial because of the inter-racial content of the film. App. R, App. 97-98. It was only after extensive questioning by Judge Gibbons that the court finally got Mr. Caldwell to recent his stated bias and indicate that he could be fair and impartial. The Court then refused to excuse Mr. Caldwell for cause, resulting in the Defendants' using their last preemptory challenge.

A juror who has formed an opinion cannot be impartial. ***Irvin v. Dowd***, 366 U.S. 717, 772 (1961). It is unquestionable that Mr. Caldwell not only formed an opinion, but explicitly indicated that he could not be impartial, irrespective of later statements to the contrary. Defendants were forced to utilize and, in fact, exhausted their preemptory challenges on prospective jurors who were unquestionably biased and who should have been stricken for cause. The denial or impairment of the right of preemptory challenges is reversible error without a showing of prejudice. ***Swain v. Alabama***, 380 U.S. 202, 219 (1965). Here, the impairment of the right of preemptory challenges is unquestionable.

CONCLUSION

Because of the threat to fundamental constitutional freedoms, this Court should accept this case for review to resolve these issues of and related to paramount First Amendment concerns.

Respectfully submitted,

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

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NOT RECOMMENDED FOR PUBLICATION

No. 91-5208

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, **Plaintiff-Appellee,** v. ELLWEST STEREO THEATRES OF MEMPHIS, INC., d/b/a EXECUTIVE SOUTH; CHARLES LONG; and RODNEY SKINNER, **Defendants-Appellants.**	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.** (Filed Jan. 10, 1992)

BEFORE: RYAN and NORRIS, Circuit Judges; and Bell, District Judge.*

PER CURIAM. Rodney Skinner, Charles Long, and Ellwest Stereo Theatres of Memphis, Inc. ("Ellwest"), appeal their convictions for selling obscene matter in

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*The Honorable Robert Holmes Bell, United States District Judge for the Western District of Michigan, sitting by designation.

violation of 18 U.S.C. § 1466 and 18 U.S.C. § 2. They raise issues concerning the constitutionality of 18 U.S.C. § 1466, rulings by the district court during trial, and application of the Sentencing Guidelines.

As defendants' arguments lack merit, we affirm the judgment of the district court.

I.

Ellwest owns and operates three adult bookstores in the Memphis area that offer their patrons a selection of video tapes and printed matter. Long and Skinner served as president and secretary of Ellwest, respectively.

On August 17, 1989, a Memphis police sergeant purchased a videotape from the Executive South adult bookstore, which is owned and operated by Ellwest. A few hours later, a second police officer bought another copy of this videotape from the same store.

As a result of these transactions, a grand jury returned an indictment against defendants, charging them with engaging in the business of selling obscene matter which had been shipped in interstate commerce, in violation of 18 U.S.C. § 1466[1] and aiding and abetting

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[1] This statute reads in part as follows:

> (a) Whoever is engaged in the business of selling or transferring obscene matter . . . which has been shipped or transported in interstate . . . commerce, shall be punished by imprisonment for not more than 5 years or by a fine under this title, or both.

(Continued on following page)

such illegal activity, in violation of 18 U.S.C. § 2. They were convicted on May 11, 1990.

II.

Defendants raise several challenges to the constitutionality of 18 U.S.C. § 1466.

A. Mandatory Rebuttable Presumption

As written, the statute creates a rebuttable presumption that a person is "engaged in the business" of transferring obscene material if certain criteria set forth in the statute are met. Defendants contend that the presumption is mandatory because the statute reads "[the criteria] *shall* create a rebuttable presumption that the person so offering them is 'engaged in the business'. . . . " 18 U.S.C. § 1466(b) (1988).

(Continued from previous page)

> (b) . . . [T]he term "engaged in the business" means that the person who sells . . . obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit, although it is not necessary that the person make a profit or that the selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income. The offering for sale of or to transfer, at one time, two or more copies of any obscene publication, or two or more of any obscene article . . . shall create a rebuttable presumption that the person so offering them is "engaged in the business" as defined in subsection (b).

18 U.S.C. § 1466 (1988).

Use of a rebuttable mandatory presumption in a criminal prosecution amounts to a violation of due process guaranteed by the Constitution because it "relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding." *Francis v. Franklin*, 471 U.S. 307, 317 (1985).

In the case before us, the trial judge recognized that the charging statute, as written, could violate defendants' due process protections. She therefore instructed the jury in terms of a permissive inference. Consequently, we decline to rule on the constitutionality of 18 U.S.C. § 1466 as written, and instead turn to the propriety of the trial court's instruction.

B. Permissive Inference

On the issue of whether defendants were "engaged in the business" of selling obscene matter, the trial court instructed the jury in the following terms:

> In considering whether a defendant is engaged in the business of selling or transferring obscene matter, if you find that a person sold or transferred at one time two or more obscene items or two or more copies of an obscene item, you may find that person is engaged in the business of selling obscene matter. Whether you choose to draw such an inference is strictly up to you.

By couching its instruction in this manner, the district court left the determination of this element to the jury.

"A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." *Francis v. Franklin*, 471 U.S. at 314. Under this circumstances, a defendant's due process rights are implicated only when "there is no rational way the trier could make the connection permitted by the inference." *County Court v. Allen*, 442 U.S. 140, 157 (1979). In determining whether a rational connection exists, the Supreme Court has offered this guidance: "[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary v. United States*, 395 U.S. 6, 36 (1969).

Using this analytical frame work, we conclude that the trial court's instruction regarding the "engaged in business" element passes constitutional muster. In assisting the jury in understanding an element of the crime, the court alluded to the definition preferred by Congress. The instruction did not require the jury to infer a fact from proven facts, however, because the drawing of the inference was expressly said to be permissive, not mandatory. Since it is more likely than not that the sale of two obscene films indicates that an individual is engaged in the business of selling obscene matter, the inference suggested to the jury passes the rationality test outlined in *Leary*.

C. Void for Vagueness

Defendants argue that the terms "engaged in the business" and "as a regular course of trade or business" as used in 18 U.S.C. § 1466 are impermissibly vague.

This court has already considered, and rejected, a challenge to the phrase "engaged in the business" in the context of dealing in firearms. *See United States v. Day*, 476 F.2d 562, 567 (6th Cir. 1973). The same analysis applies with equal force in the context of the statute under consideration.

In addition, the "two sale" definition found in the statute, when utilized in the context discussed above, unequivocally puts the public on notice of the level of activity that will support the drawing of an inference that an individual is engaged in the business of selling obscene material. While defendants may disagree with this standard, it is anything but vague.

III.

We now turn to rulings made by the trial court that defendants contend deprived them of a fair trial.

A. Jury Selection

It is asserted that the trial court's refusal to exclude three venirepersons for cause constituted error. We begin our discussion of this issue by noting that defendants' burden is onerous. Once the trial judge determines that a potential juror can set aside any existing prejudice, the decision will only be reversed on a showing of manifest

error. *United States v. Smith*, 748 F.2d 1091, 1094 (6th Cir. 1984).

Defendants object to the court's refusal to exclude prospective jurors Caldwell, Norfolk, and Ostroff for cause.[2] Of these three individuals, only the seating of Mr. Caldwell merits close scrutiny. We find nothing in the record to indicate that the court committed manifest error in the seating of either Ms. Norfolk or Ms. Ostroff.

The trial court's decision regarding Mr. Caldwell, however, requires further discussion. His responses to a jury questionnaire, later confirmed by questions from the court, make clear that he found the interracial aspect of the videotape objectionable. Without more, this sentiment might merit the exclusion of Mr. Caldwell for cause. Nonetheless, the trial court chose to probe the extent to which his views would affect his ability to render an impartial verdict:

> THE COURT: [Could you] [t]alk about the evidence and render a fair and impartial verdict in the case?
>
> MR. CALDWELL: Yes, Yeah, I can do that.
>
> THE COURT: Okay. Can you do that without considering in any way the fact that some of the sexual conduct is between black people and

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[2] These venirepersons were all excluded through the use of peremptory challenges. Because it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause, we must reach this issue. *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976) (citing *Swain v. Alabama*, 380 U.S. 202 (1965)).

white people, specifically, between black men and white women? Can you do that?

MR. CALDWELL: Yeah I can.

THE COURT: You don't have any concern with that?

MR. CALDWELL: No, I don't have any doubt in my mind.

As the application of the manifest error standard of review indicates, the trial court has traditionally been accorded wide latitude in decisions regarding jury selection. Unlike the members of this court, the trial judge has the opportunity to observe and question potential jurors and is thus in a better position to determine whether a person, if seated, could render an impartial verdict.

Defendants were not entitled to a jury comprised of persons who approved of the content of the videotape. While Mr. Caldwell undeniably presented the trial court with a close call, we are satisfied that, on the basis of the colloquy cited above, the district court was warranted in concluding that this juror could set his personal convictions to one side and obey the court's instructions.

B. Community Standards Instruction

Defendants contend that the trial court erred by instructing the jury as follows:

> Contemporary community standards are set by what is in fact *accepted* in the community as a whole; that is to say by society at large or people in general; and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept.

Although they concede that this language is taken verbatim from *Federal Jury Practice and Instructions*, § 62.07 (West 1977), defendants argue that the court should have substituted *tolerated* for *accepted*. As support for this proposition, they cite dictum from *Smith v. United States*, 431 U.S. 291, 305 (1977) (contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community). Despite this language, there is nothing in *Smith* that indicates that the Court intended to modify the seminal test outlined in *Miller v. California*, 413 U.S. 15, 32 (1973), which uses "acceptance" language.

Furthermore, subsequent to the *Smith* decision, this court, in *United States v. Battista*, 646 F.2d 237, 245 (6th Cir.), *cert. denied*, 454 U.S. 1046 (1981), reviewed this same contention and unequivocally rejected it.

C. Obscenity Test Definitions

Defendants contend that their defense was prejudiced by the trial court's denial of their motion requesting a definition of the geographic boundaries of the relevant "community" to be applied in the community standards prong of the *Miller* test.

The Supreme Court has long since spoken on this issue. In *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974), the Court explicitly approved the decision of the trial court to instruct jurors to apply "community standards" without specifying the exact extent of the "community."

D. Right to Confront Witnesses

Defendants object, on Sixth Amendment grounds, to the trial court's refusal to permit them, on cross-examination, to ask one of the police officers why he felt the videotape was obscene. When considering this issue, we note that rulings such as the one in question should not be overruled without a showing of an abuse of discretion.

The trial court reasoned that this line of questioning would be both confusing and inappropriate, particularly because the question before the jury concerned what the *average* community member, not a police officer, judged to be obscene. Because we agree with this reasoning, the trial court cannot be said to have abused its discretion. *See United States v. Marchesani*, 457 F.2d 1291, 1297 (6th Cir. 1972).

IV.

Finally, defendants object to the trial court's application of the Sentencing Guidelines. Before reaching those issues, however, we must first address defendant Skinner's argument that 18 U.S.C. § 1466 does not apply to him.

A. The Scope of Section 1466

Skinner argues that the charging statute is inapplicable to him because, as a salaried employee of Ellwest, he was not engaged in the prohibited activity with the "objective of earning a profit."

However, we need not reach the issue as Skinner frames it, because he was also charged under 18 U.S.C.

§ 2 as an aider and abettor. He does not dispute that Ellwest is subject to prosecution under 18 U.S.C. § 1466. Consequently, Skinner's conduct in furtherance of Ellwest's criminal conduct renders him chargeable as a principal under the terms of 18 U.S.C. § 2.

B. Application of the Sentencing Guidelines

Defendants dispute three decisions with respect to the Sentencing Guidelines.

(1) Five-Level Enhancement for Skinner

The trial court imposed a five-level enhancement to Skinner's sentence pursuant to U.S.S.G. § 2G3.1(b)(1). This represents the minimum possible enhancement under this section.

Skinner's argument is similar to that just discussed: as an employee of Ellwest, he did not share in its profits. However, section 2G3.1(b)(1) reads as follows: "If the offense involved an act related to distribution for pecuniary gain, increase . . . in no event by less than 5 levels."

This language does not explicitly limit the term "pecuniary gain" to profits derived from an ownership interest. As established at trial, Skinner received a salary as the result of his employment with Ellwest. This circumstance is sufficient to meet the pecuniary gain prerequisite.

(2) Enhancement for Violence

The trial court also added four offense levels to defendants under U.S.S.G. § 2G3.1(b)(2), which deals with material that portrays "[s]adomasochistic conduct or

other depictions of violence." One scene from the videotape depicts a man's penis being sliced off.

Defendants argue that the principles of obscenity jurisprudence govern and, as a result, the work must be assessed as a whole. *See Miller v. California*, 413 U.S. at 24. When viewed in context, they contend that the scene at issue could be taken as humor or a dream sequence.

Defendants cite no authority in support of their contention that the Sentencing Guidelines are limited in such a fashion. Moreover, the jury had already determined that the videotape, taken as a whole, was obscene. It remained for the trial court simply to determine whether an enhancement for violence was merited pursuant to the guidelines.

(3) Reduction for Acceptance of Responsibility

The trial court found that defendants had not acknowledged responsibility for their conduct. Without a showing of clear error, this decision should be left to the trial court. *United States v. Saenz*, 915 F.2d 1046, 1047 (6th Cir. 1990). Particularly in light of the fact that defendants put the government to its burden of proof at trial, we find nothing in the record to indicate that the trial court committed clear error in refusing their request for a reduction due to acceptance of responsibility.

Defendants raise several additional arguments in their briefs on appeal, but they are without merit.

V.

For the foregoing reasons, the judgments and sentences of the district court are **affirmed.**

APPENDIX B

No. 91-5208

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ELLWEST STEREO THEATRES OF MEMPHIS, INC., D/B/A EXECUTIVE SOUTH; CHARLES LONG; RODNEY SKINNER, Defendants-Appellants.	)	**ORDER** (Filed Feb. 27, 1992)

BEFORE: RYAN and NORRIS, Circuit Judges; and BELL,* United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

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* Hon. Robert Holmes Bell sitting by designation from the Western District of Michigan

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX C

Case No: 91-5208

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

(Filed Mar. 13, 1992)

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ELLWEST STEREO THEATRES OF MEMPHIS, INC., doing business as Executive South; CHARLES LONG; RODNEY SKINNER

Defendants-Appellants

BEFORE: RYAN and NORRIS, Circuit Judges; BELL, District Judge.*

Upon consideration of the motion to stay the mandate submitted by the appellant,

It is **ORDERED** that the motion be and it hereby is granted and the mandate shall now stay for 30 days pending the filing of certiorari at the Supreme Court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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* The Honorable Robert Holmes Bell, District Judge for the Western District of Michigan, sitting by designation.

APPENDIX D

§ 1466. Engaging in the business of selling or transferring obscene matter

(a) Whoever is engaged in the business of selling or transferring obscene matter, who knowingly receives or possesses with intent to distribute any obscene book, magazine, picture, paper, film, videotape, or phonograph or other audio recording, which has been shipped or transported in interstate or foreign commerce, shall be punished by imprisonment for not more than 5 years or by a fine under this title, or both.

(b) As used in this subsection[1], the term "engaged in the business" means that the person who sells or transfers or offers to sell or transfer obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit although it is not necessary that the person make a profit or that the selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income. The offering for sale of or to transfer, at one time, two or more copies of any obscene publication, or two or more of any obscene article, or a combined total of five or more such publications and articles, shall create a rebuttable presumption that the person to offering them is "engaged in the business" as defined in subsection (b)[2].

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[1] So in original. Probably should be "section".

[2] So in original. Probably should be "this subsection".

(Added Pub.L. 100-690, Title VII, § 7521(a), Nov. 18, 1988, 102 Stat. 4489.)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

VS.

ELLWEST STEREO THEATERS
OF MEMPHIS, INC., et al,

Defendants.

No. 89-20254
No. 89-20255
No. 89-20256

ORDER DENYING MOTIONS TO DISMISS

(Filed Mar. 19, 1990)

On February 1, 1990, defendants filed three motions to dismiss the indictments against them. Defendants were indicted under 18 U.S.C. § 1466 and under 18 U.S.C. § 2. section 1466 is entitled "Engaging in the business of selling or transferring obscene matter" and states:

> (a) Whoever is engaged in the business of selling or transferring obscene matter, who knowingly receives or possesses with intent to distribute any obscene book, magazine, picture, paper, film, videotape, or phonograph or other audio recording, which has been shipped or transported in interstate or foreign commerce, shall be punished by imprisonment for not more than 5 years or by a fine under this title, or both.

> (b) As used in this subsection, the term "engaed in the business" means that the person who sells or transfers or offers to sell or transfer obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit, although it is not necessary that the person make a profit or that the selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income. The offering for sale of or to transfer, at one time, two or more copies of any obscene publication, or two or more of any obscene article, or combined total of five or more such publications and articles, shall create a rebuttable presumption that the person so offering them is "engaged in the business" as defined in subsection (b).

Section 2 of Title 18, entitled "Principals," states:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Defendants argue that the indictments should be dismissed, because 18 U.S.C. § 1466 is unconstitutionally vague and unconstitutionally infringes on the their customers' rights to privacy. Individual defendants Charles Long, Rodney Skinner, and Diane Wells, move to dismiss the indictments on the ground that 18 U.S.C. § 1466 does not apply to them.

Defendants move to dismiss the indictments against them on the ground that 18 U.S.C. § 1466 is unconstitutionally vague. Defendants contend that the phrases "engaged in the business" and "regular course of trade or business" are vague, because they provide no guidance as to how much of a defendant's business must be devoted to the trafficking of obscene materials for the defendant to fall within the scope of the statute.

The definition in 18 U.S.C. § 1466(b) is taken from the definition of "engaged in the business" used in the Firearms Owners' Protection Act, Pub. L. No. 99-308 (1986) which amended and clarified the Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.* 134 Cong. Rec. E3750-01 (1988) (statement of Hon. Hughes) (section-by-section analysis of the Child Protection and Obscenity Enforcement Act of 1988).[1] The Gun Control Act regulates the conduct of dealers of firearms. *See* 18 U.S.C. § 922. Prior to the 1986 amendments, the definition of "dealer" provided in the statute was "any person engaged in the business of selling firearms or ammunition at wholesale or retail." 18 U.S.C. § 921(a)(11). The 1986 amendments substituted a narrower definition of "dealer" by further defining the term "engaged in the business." *United States v. Shumann,* 861 F.2d 1234, 1237 (11th Cir. 1988). The statute now contains the following definition:

The term "engaged in the business" means –

* * *

---

[1] Section 7521 of the Child Protection and Obscenity Enforcement Act of 1988 created 18 U.S.C. § 1466.

> (D) as applied to a dealer in firearms, . . . a person who devotes time, attention, and labor to engaging in such activity as a regular course of trade or business with the principal objective of livelihood and profit. . . .

18 U.S.C. § 921(a)(21)(D). *See also* 18 U.S.C. § 921(a)(21)(C).

Prior to the 1986 amendments to the firearms statutes, the term "engaged in the business" was subject to judicial interpretation. *United States v. Shumann,* 861 F.2d at 1237 n. 2. Challenges to the statute as being unconstitutionally vague were rejected. *See United States v. Shirling,* 572 F.2d 532, 534 (5th Cir. 1978) (citing cases); *United States v. King,* 532 F.2d 505, 510 (5th Cir.), *reh'g denied,* 536 F.2d 390 (5th Cir.), *cert. denied,* 429 U.S. 960 (1976); *United States v. Williams,* 502 F.2d 581, 583 (8th Cir. 1974). In *Williams,* the Eighth Circuit agreed with the reasoning of a district court which stated:

> While it is true that [the statute] requires no minimum number of sales, dollar volume of sales, or number of employees to constitute "engaging in business," . . . there should be no doubt in the minds of men of common intelligence that "dealer" means one that is engaged in *any* business of selling . . . firearms and that "business" is that which occupies time, attention and labor of men for the purpose of livelihood or profit.

502 F.2d at 583 (quoting *United States v. Gross,* 313 F. Supp. 1330, 1333 (S.D. Ind. 1970), *aff'd,* 451 F.2d 1355 (7th Cir. 1971)). The Sixth Circuit, in *United States v. Day,* 476 F.2d 562, 567 (6th Cir. 1973), approved of the district court's instructions to the jury that:

> Dealer . . . means one that is engaged in the business of selling, repairing or pawning firearms and the business is that which occupies the time, attention and labor of the man for the purpose of livelihood or profit.

The Sixth Circuit observed that there was no statutory standard defining "engaged in the business," and held that the "judicial definition [was] an adequate reflection of the *plain meaning* of the phrase." *Id.* (emphasis added). The definitions of "engaged in the business" applied and accepted as constitutional by the courts prior to the 1986 amendments are now codified in the firearms statute, 18 U.S.C. § 921(a)(21), and the obscenity statute, 18 U.S.C. § 1466(b).

If anything, 18 U.S.C. § 1466(b) provides an even more precise definition for "engaged in the business," because it creates a rebuttable presumption that an individual is "engaged in the business," if the [sic] he offers for sale or transfers, "at one time, two or more copies of any obscene publication, or two or more of any obscene article, or a combined total of five or more such publications and articles." Defendants argue that the inclusion of this rebuttable presumption somehow supports their argument that the statute is constitutionally vague. The court finds no merit in defendants' position. The presumption is designed to preclude a trafficker in obscene material from avoiding prosecution simply because in a particular case the "evidence adduced to prove that the trafficker was engaged in the business of selling or transferring obscene matter was that the defendant trafficked in a relatively small number of obscene items." 134 Cong. Rec. E3750-01 (1988) (statement by Hon. Hughes). The

legislative history suggests that the defendant can rebut the presumption by "evidence that the articles or publications were offered for sale or transfer in the course of carrying on the defendant's general trade or business in lawful books, magazines, audio or video products, and that he did not, in the regular course of business, devote time, attention or labor to the selling of obscenity." *Id.* It is not an irrebuttable presumption as asserted by defendants. Accordingly, defendants' motion to dismiss the indictments on the ground that 18 U.S.C. § 1466 is unconstitutionally vague is denied.

Defendants also move this court to dismiss the indictments against them on the ground that 18 U.S.C. § 1466 violates their customers' privacy rights. Without deciding whether defendants have standing to assert the privacy rights of their customers, this court rejects defendants' contention that § 1466 is a violation of the constitution. Defendants rely on the United States Supreme Court case, *Stanley v. Georgia*, 394 U.S. 557 (1969), and a Hawaiian Supreme Court case, *State of Hawaii v. Kam*, 748 P.2d 372 (1988), to support their argument that an individual has the right to possess obscene material in the privacy of his own home, *Stanley*, 394 U.S. at 568, and there necessarily follows a correlated right to purchase such materials for this personal use, or the underlying privacy right becomes meaningless. *Kam*, 748 P.2d at 380 (citing *United States v. Orito*, 413 U.S. 139, 146 (1973) (Brennan, J., dissenting); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 381 (1971) (Black J., dissenting)).

The holding in *Stanley* was a narrow one. *Stanley* merely limited the extent to which the government can

regulate obscenity. The Supreme Court in *Stanley* held, "the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." *Stanley*, 394 U.S. at 568. The Supreme Court has consistently rejected constitutional protection for obscene material outside the home. *See United States v. 12 200 Ft. Reels of Super 8mm Film*, 413 U.S. 123 (1973) (Congress may prohibit importation of obscene matter, notwithstanding that the material is for importer's private use and possession); *Miller v. California*, 413 U.S. 15 (1973); *United States v. Reidel*, 402 U.S. 351 (1971) (Congress may prohibit knowing use of the mails for the delivery of obscene matter). The Supreme Court has rejected defendants' argument that the right to possess obscene material in one's own home gives rise to a correlative right to have someone sell or give it to others. *See United States v. Orito*, 413 U.S. at 141; *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971); *United States v. Reidel*, 402 U.S. at 355. The zone of privacy that *Stanley* protected does not extend beyond the home. *Thirty-Seven Photographs*, 402 U.S. at 376; *Reidel*, 402 U.S. at 354-56.

The Hawaiian case that defendants cite cannot support their position. The court in *Kam*, 748 P.2d at 377, based its holding on state law grounds and did not apply the precedents of the United States Supreme Court as this court is bound to do. The Hawaiian constitution expressly provides a right of privacy, and "affords greater privacy rights than the federal right to privacy." *Id.* Defendants contend that their position is not inconsistent with the United States Supreme Court decisions. They

concede that the government can regulate obscenity outside the home. Their position is that the statute is unconstitutional, because it unnecessarily infringes on their consumers' privacy rights when there are less restrictive means available for achieving the government's interest.

Defendants' argument, however, is inconsistent with the Supreme Court holdings. Defendants assume that governmental regulation of obscene material outside the home is an infringement of the fundamental right to privacy and therefore is subject to the strict scrutiny test. The Supreme Court's holdings reflect the understanding that the right to privacy in the context of obscenity is limited to the home, and a fundamental right is not infringed upon by the public regulation of obscenity. *See Thirty-Seven Photographs*, 402 U.S. at 376 ("*Stanley's* emphasis was on the freedom of thought and mind in the privacy of the home."); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973) ("The idea of a 'privacy' right and a place of public accommodation are, in this context, mutually exclusive.") Therefore, defendants' motion to dismiss the indictments on the ground that 18 U.S.C. § 1466 is unconstitutional is denied.

Defendants Charles Long, Rodney Skinner, and Diane Wells move this court to dismiss the indictments against them on the ground that 18 U.S.C. § 1466 does not apply to them. Defendants contend that § 1466 does not apply to persons who are merely store clerks, and they claim that they were merely store clerks.

Section 1466 penalizes the knowing receipt or possession with intent to distribute obscene materials. The application of § 1466 is limited to those who are engaged

in the business of selling or transferring obscene matter. This limitation is designed to pr vent the application of this statute to legitimate retailers who might possess on a single occasion items in inventory that are subsequently adjudged obscene. *See* 134 Cong. Rec. E3750-01 (1988) (statement of Hon. Hughes); *see also* 134 Cong. Rec. S17360-02 (1988) (statement of Sen. Biden). Subsection (b) defines "engaged in the business" and limits the application of § 1466 to "the person who sells or transfers or offers to sell or transfer obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit. . . . " The definition could describe the activities of an employee, because the employee devotes time, attention, and labor with the objective of earning a profit, although the profit may not be for the employee personally. The reference to a profit motive, however, suggests that Congress may have intended that the statute apply to only those with a financial interest in the business.

The court need not resolve at this time the question of whether § 1466 applies to mere store clerks. The United States has refuted defendants' contention that the individual defendants were simply store clerks. Moreover, even if the conduct of the individual defendants does not place them within the scope of 18 U.S.C. § 1466, their conduct could place them within the scope of 18 U.S.C.

§ 2 as aiders and abettors. Therefore, dismissal of the indictment is not warranted.

IT IS SO ORDERED.

/s/ Julia Smith Gibbons
JULIA SMITH GIBBONS
UNITED STATES
DISTRICT JUDGE

March 19, 1990
DATE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

VS. No. 89-20254 G

ELLWEST STEREO THEATERS OF MEMPHIS, INC., et al.,

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL

(Filed Jan. 14, 1991)

Before the court is defendants' motion for judgment of acquittal or new trial. Defendants were convicted after trial by jury of receiving or possessing with intent to distribute obscene matter in violation of 18 U.S.C. §1466 and §2.

Defendants first argue that a new trial should be granted because the court erred in refusing to excuse a prospective juror for cause. Defendants argue that the court's refusal to excuse the juror for cause forced them to use their last preemptory challenge.

The prospective juror referred to in the motion initially indicated on the written questionnaire given to all jurors that he could not render a fair and impartial verdict in the case, because he would find material in the

movie personally offensive. After extensive and detailed questioning by the court, the juror indicated that he could render a fair and impartial verdict and that the fact that the material on the film might be personally offensive to him would not influence him in his deliberations. The prospective juror also indicated some confusion over the meaning of at least one question on the questionnaire. Several other jurors had similarly expressed confusion. Under these circumstances, the court concluded that the prospective juror's verbal assurances of his ability to be fair and impartial should be given weight, and the juror should not be excused for cause.

Defendants were not in any way precluded from the exercise of preemptory challenges. The challenge to the prospective juror was not a proper challenge for cause, and the court correctly left the decision as to whether to exercise a preemptory challenge against this juror to the discretion of defense counsel. The court further notes that defendants were given two additional preemptory challenges during the jury selection process, and that the court excused a number of other jurors for cause throughout the jury selection. There was no error in the court's refusal to remove the prospective juror for cause.

Defendants next argue that the "rebuttable presumption" created in 18 U.S.C. §1466(b) is an unconstitutional mandatory presumption. This issue was discussed extensively during trial by the court and counsel, and the court will not reiterate further its reasoning with respect to the issue. The court believes that its ruling concerning the statute's "rebuttable presumption" language was correct and that the jury was correctly charged on this point. Thus, the statutory "rebuttable presumption" did not

have the effect of shifting the burden of proof and burden of persuasion to defendants on the issue of whether they were "engaged in the business" of selling obscene matter.

Defendants also argue that they were deprived of a fair trial by certain of the court's rulings with respect to the "rebuttable presumption" language. First, they assert that they were prejudiced by the court's requirement that they display a poster board containing the rebuttable presumption portion of the statute. This ruling arose as follows. During opening statement defendants elected to present to the jury a visual aid showing a portion of the statute in question. In response to the government's objection, the court ruled that, if defendants were going to use such a visual aid, they must show to the jury the complete language of the statute. Defendants elected to show the complete language, but now complain that they should not have been required to do so. The court disagrees.

Defendants' initial approach to the use of the visual aid with the jury was misleading. When the court ruled that the entire language of the statute must be shown to the jury, if any visual aid was to be used, defendants did not raise with the court any issue about the presumption as a reason for not showing the second visual aid to the jury. Under these circumstances defendants cannot complain now that they had to show the jury the complete language of the statute. In fact, if the court had ruled otherwise, the jury would have had an incomplete preliminary impression about the statute in question.

Defendants also assert that they were misled by the court to believe that the court would rule the presumption unconstitutional. Their reliance on this belief, they assert, produced a decision on their part not to present any evidence to show that the remaining materials in the store were not obscene.

Defendants were not in fact misled by the court and, when they closed their proof, specifically knew that the court had not made a definite ruling on the presumption issue. They made their decision concerning presentation of other proof with full awareness of the various options the court was considering. In addition, they knew that the court had limited its ruling on their motion for judgment of acquittal in a way that reserved the constitutional issue for later determination. Moreover, when the court made its ultimate ruling on the presumption issue, defendants did not ask to reopen their proof to present evidence concerning the materials in the store other than the movie that was the subject of the indictment. If they had made their decision not to present this evidence based on any prior comments by the court, surely defendants would have utilized this simple means of correcting their error in judgment. Defendants cannot thrust upon the court responsibility for their own decision about trial strategy. They simply decided that it was in their interest not to present to the jury volumes of proof about other materials in the store, which the jury might well find to be obscene.

Defendants next argument that the evidence at trial was insufficient to show that they were "engaged in the business" of selling obscene material and was also insufficient to establish "contemporary community standards"

and the element of *scienter.* For the reasons stated by the court at trial, the court believes that the evidence presented was sufficient to permit the jury to find each element of the offense charged as to each defendant beyond a reasonable doubt.

Defendants also argue that they were deprived of a fair trial by this court's failure to provide to them pretrial definitions of certain terms utilized in charging the jury in any obscenity case. The court knows of no obligation prior to trial to advise defendants or the government of what the court's charge at the end of the case will be. In fact, the court did provide substantial guidance to defendants concerning the court's charge and the definitions to be utilized by the court.

Finally, defendants complain that the court's jury instruction concerning the term "patent offensiveness" was incorrect. The jury instructions were extensively discussed with counsel at trial, and for the reasons stated at that time, the court believes that its instructions were correct.

The motion is denied.

IT IS SO ORDERED.

/s/ Julia Smith Gibbons
JULIA SMITH GIBBONS
UNITED STATES
DISTRICT JUDGE

January 11, 1991
DATE

APPENDIX G

* * *

[p. 423] MR. NEWSOM: Your Honor, I object and make the same objection I did earlier. I was shown two of those charts up there, and I was under the impression Mr. Klein was going to show both of them to the jury, because the second one goes to my objection, and he hasn't at this point, and he has continued to make that same misstatement to the jury, and I object to it.

THE COURT: I have not seen either of these two particular charts, but I would think we have had a discussion at the bench that indicated that was going to be clarified for the jury. This is the same point we talked about earlier.

MR. NEWSOM: It is, Your Honor, and it has not been. He had told me –

THE COURT: Just calm down, Mr. Newsom. I think now is the time to state precisely – If you are [p. 424] going to talk about the law, let's state precisely what it is with respect to that.

MR. NEWSOM: Thank you.

MR. KLEIN: Your Honor, I was very precise in what I have been saying. Not simply isolated instant of the sale of one video.

MR. NEWSOM: It is misleading, Your Honor.

MR. KLEIN: If he wants to conduct my opening statement, Your Honor, I have been very careful.

MR. NEWSOM: Your Honor, I want something not misleading to this jury.

THE COURT: Mr. Newsom, calm down. Mr. Klein, you need to put up the other one and state precisely what the statute says on this particular subject.

MR. NEWSOM: Thank you, Your Honor.

MR. KLEIN: Is the court telling me I have to put this up right at this point in time.

THE COURT: I don't care whether you put it up or tell them precisely what it is.

MR. KLEIN: Section B. I am going to get through in a minute, and it is rather long, and we will chat about it just a minute.

MR. NEWSOM: I don't think some of the jurors on the end can see it. You are standing in their line, [p. 425] Mr. Klein.

(Whereupon, jury examines chart.)

* * *

APPENDIX H

[p. 1140] (Whereupon, the hearing of the cause was resumed on this, the 7th day of May, 1990, at 9:35 a.m.)

THE COURT: I know I told you all 9:00 o'clock, but I'm sorry. I just couldn't get out here to get started.

I am going to kind of tell you all really what I think at this point about these motions and then maybe do something in writing later.

I think that the defendants may well be correct about the rebuttable presumption. However, even if they are correct, I don't think it would be the basis for granting a motion for judgment of acquittal, because I don't know why that would render the entire offense invalid. It would seem to me that what you would do is simply charge the jury about the government's burden to prove engaged in business, and you would not charge them about the application of any presumption. I don't think it is a basis for a judgment of acquittal. We can talk about that some more at the end of the case if you want to, but there is nothing that would convince me that that presumption provision if not severable from the rest of the statute so that you still have a valid criminal offense even if you don't have a presumption that is applicable.

[p. 1141] THE COURT: Yes.

MR. KLEIN: Is the Court then saying that it is sufficient for simply one material subsequently in a trial determined to be obscene, even though there were two copies of the one material, that that in and of itself is sufficient as a matter of law that the jury can consider that that demonstrates in the business?

THE COURT: I would say that the jury could find beyond a reasonable doubt that a company that was selling copies – in this case we know of two, and I think that they could infer from the sale of the two that at least this particular tape was being offered for sale by this company, I think they could find engaged in the business.

Now, you get into all kinds of questions like what is – in fact, Congress has told us that by creating the presumption that it would consider that enough.

MR. KLEIN: Obviously, my opinion is that Congress told us that that was not enough, because the Congressional Report, and in fact by the mere existence of the presumption it being rebuttable, demonstrates that one is insufficient.

THE COURT: It is a difficult question. It is a difficult question, and the question is if you [p. 1142] decide you are right about the presumption, then what do you do with it?

MR. KLEIN: That's why the earlier discussion of do I have to bring everything in from the store to show that everything else is not obscene.

THE COURT: It is my understanding you have decided not to do that anyway.

MR. KLEIN: We have generally decided we were not planning on doing it. Obviously, we are waiting for the Court's ruling this morning so we would have an idea, and do I take it that the Court is going to declare the presumption separable but unconstitutional?

THE COURT: Probably. What I'm doing right now is denying your motion for judgment of acquittal

and saying I don't think that it is a basis for acquittal, even if your motion is well taken. It is a tough problem, though, in terms of how –

MR. KLEIN: We have hasseled [sic] with it for months, Your Honor, trying to figure out what to do.

THE COURT: I have been thinking about it for three or four days now, and I'm not sure I am a whole lot further along in my thinking than I was three or four days ago. It is a difficult issue, but my current thinking is, assuming you are right about the constitutional argument, that it still doesn't render the [p. 1143] offense as a whole invalid.

Maybe the argument is in keeping with congressional intent you are entitled to some instruction that indicates who the statute is intended to apply to. I don't know. Of course, the statute itself defines engaged in business, apart from the portion – so maybe you are not entitled to anything other than the language in the statute. We are going to talk about all this.

* * *

APPENDIX I

* * *

[p. 1578] THE COURT: That is not quite the issue. This is the issue. First, you decide what the statute creates, whether it is permissive or mandatory. My best reading of the statute, based on the literal language of the statute, and also the discussion that is reflected in the legislative history, is that Congress clearly intended to create a mandatory presumption. They can't do that. In that regard, as I said yesterday, it makes no difference, although the defendants contend otherwise, it makes no difference whether this is an obscenity case or any other type case. It is true. If the burden on an essential element was shifted to the defendants away from the government –

[p. 1579] MR. KLEIN: In that regard, yes, it makes no difference.

THE COURT: It makes no difference. Obviously, there are special considerations in this case because of the First Amendment presumption, but I can't see that that really affects the results. If there were any other elements of proof in the case that were shifted to the defendants, the result would be the same. It would be unconstitutional.

MR. KLEIN: In that context as the presumption, I one hundred percent agree.

THE COURT: That is what I kept trying to tell you all the other day.

MR. KLEIN: Maybe we were missing something. I was trying to get to the second part of the argument on that.

THE COURT: Perhaps we were ships passing in the night on that, but in any event, that's right.

Once you have concluded that the statute creates a mandatory presumption, it is obvious you can't charge the jury that this is a mandatory presumption. The question becomes whether it is appropriate to mention the presumption at all, whether the court can then treat it, having ruled that in fact this is a mandatory presumption, whether you can in fact [p. 1580] treat it as a permissive presumption. Of course, you are treating it as a permissive presumption anyway by letting it go to the jury when there is nothing other than that in the record. The question becomes whether you say anything to the jury; in other words, whether you just say this is the definition of someone engaged in the business of selling or transferring obscene materials, or whether you go further, and you say the government has presented proof that two of these tapes were sold, two copies of a particular tape in question were in fact sold. You may conclude that is enough to establish engaged in the business, but you need not do so. It is just a question as to whether you charge them about it and stop, or whether you go ahead and say this permits an inference.

MR. KLEIN: But certainly, if the court were to do that, what the court is in effect doing is legislating what Congress did here by changing "shall" to "may," if the Court were to make that statement to the jury.

THE COURT: I believe obviously by concluding that this is sufficient and it is enough from which the jury can infer that that element has been met, if that is all a permissive presumption is, that is something that permits

an inference. You are in fact [p. 1581] permitting an inference, and it is about six of one and half a dozen of the other.

MR. KLEIN: That is exactly where my second argument is that given the legislative history on this and the language of the statute, on piece of material is not enough. That is where our motion for judgment of acquittal comes in that regard, Your Honor. That is the second step of the ruling of unconstitutionality and presumption, because without that presumption, one material under that theory, you could take B. Dalton Book Store and have them come into court and be convicted on having two copies of one Penthouse magazine that they sold, and they are engaged in the business of selling obscenity if that inference is permissible.

THE COURT: But if Congress wanted to avoid B. Dalton – it is true they wanted to avoid B. Dalton, but it is also true that they wanted this to be enough under certain circumstances, and Congress, I can't help if they chose an unconstitutional –

MR. KLEIN: That is where the presumption protection comes into place the Court mentioned earlier. My clients here, simply because they sell sexually explicit material, are in no different position than B. Dalton. Congress could not pass a law that put my client in any different position simply because their [p. 1582] materials were sexually explicit. That would be a denial of equal protection as well as a violation of their First Amendment rights.

THE COURT: All the First Amendment presumption means is that the jury cannot, based on a finding that these materials are obscene, make any finding with respect to other materials.

MR. KLEIN: I agree.

THE COURT: It means that those are presumed not obscene.

MR. KLEIN: I agree one hundred percent.

THE COURT: That is the way in which that comes into play.

MR. NEWSOM: Your Honor may have read this Ulster County Court case, and if you haven't –

THE COURT: I don't think I have ever read it, but my law clerk did a really excellent memorandum for me on this, and that is one of the cases that she cites.

MR. NEWSOM: I don't know what she said, Your Honor, but if you look at that case, it has set out what the District Court did. It talks about – gives you the language of the presumption, which appears, as I submit to you, to be a mandatory type of presumption. Then it also gives the instruction, I believe gives [p. 1583] the instruction that the Court gave concerning that.

THE COURT: I will take a look at that.

MR. NEWSOM: It is along the lines of what Your Honor said.

THE COURT: I don't think that the presumption of nonobscenity, which is what it is in this case, I don't think that the First Amendment presumption, I

don't think that gets you out of having this applied as a permissible presumption, but I think there is a real question as to the extent to which a judge ought to try to pick up what Congress intended in my view to be a mandatory presumption and incorporate that in the charge. Obviously, if you are permitting the jury to infer from that that one is engaged in the business, you are in effect permitting them to draw the inference, which is about all the presumption it becomes is. The question is whether you give them any instruction at all about that, and then there is the additional problem in this case that some of the jurors may remember that language from the beginning, and you have to make a decision as to what you say about that, if anything.

MR. KLEIN: That's why I didn't want to bring it up.

THE COURT: Yes, but somehow I believe – I have gotten pretty hot at all of you all in this case [p. 1584] at times, but I think somehow you could alert me as to the nature of the problem at that point. For that matter we all could have been alerted to this issue. I understand you perhaps didn't want Mr. Newsom to know you were going to raise it, but had we all been thinking about this pretrial, we wouldn't have had to reeducate ourselves in the middle of the case on presumption.

MR. KLEIN: I had thought about it pretrial. That's why I was picking my words very carefully in what I said on opening statement, and that's why I didn't say that to them.

THE COURT: Obviously, you are always aware of the potential for a problem when a criminal statute

creates a presumption, but it had not been raised pre-trial, and it just frankly – that was not on my mind that there was going to be a question about that when you trotted that out, although I had thought of it just a while back it wasn't raised. I thought every other motion in the world was made, and I reckon I figured we were home free on that. I don't know why I though we were. It was probably a stupid conclusion, but that was the farthest thing from my mind at that precise moment was why that was being done.

MR. KLEIN: I'm sure the court can see with [p. 1585] hindsight the reason why it was not raised. I didn't know if it was going to be an issue, and had I raised it before, what I would be doing is telling him what to do to try his case to avoid that problem. He had an obligation to put on his best case.

THE COURT: I agree. That is where we are. I agree with the point. I don't think it is a basis for a judgment of acquittal, but I don't think the statute can be charged as it is written, because that would be unconstitutional. Now we have to figure out what to do with it.

Perhaps if I read Ulster County Court vs. Allen – my inclination at this point is to say nothing about the two sales. That might not be what I end up doing.

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APPENDIX J

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[p. 1636] THE COURT: There are two reasons – there are two arguments for including it. One is simply it is very apt to come up and be of concern to the jury given what I would anticipate the closing arguments of the parties would be.

Second, because of the nature of the government's proof, and also because of the discussion about it in opening statement, it is just a question that is going to logically come into their minds, so I think that it may be well to say okay, you know, if you want to decide this is enough, you can decide this is enough.

The other thing about it is I remember that Ulster County Court vs Allen, and that case is really interesting. It seems to basically – you can make a [p. 1637] pretty strong argument that what that case says is, among other things, is that you don't look at the facial validity of the presumption as written in the statute. What is really determinative is what the judge said about it to the jury, and that involved a statute which in my judgment created a mandatory presumption, and the judge gave an instruction that ultimately was determined to have been okay.

Second, in discussing Section 1465, the recommendation in the Federal Judicial Center's pattern jury instructions as to what you should do with that presumption as a judge is to do exactly what I have done with the 1466 presumption. Those are the arguments for including it, which are –

MR. KLEIN: Section 1465 is a different statute. It doesn't involve this same engaged in the business in the same manner it is in 1466. What the court is effectively doing to this jury is saying while it is couching it in terms of you may find that, what the court is basically saying is that is sufficient as a matter of law to this jury.

THE COURT: I'm not saying it is sufficient as a matter of law. I am saying it can be sufficient as a matter of law. If I didn't believeit [sic] could be sufficient as a matter of law, then I would have granted [p. 1638] your motion for judgment of acquittal. Obviously, I have made the decision it can be sufficient as a matter of law.

MR. KLEIN: Rhetorically to the court, then, how could the jury come to a conclusion – let's assume for a minute the jury determines the film, "Blacks and Blondes," to be obscene. If the court believes it is sufficient as a matter of law, the evidence is there it was sold in the normal course of business.

THE COURT: I said it could be. It is a question can this evidence, if the jury believes all of it, be sufficient, and the answer is yes.

That proof does not address the remaining elements that are required to find that one is engaged in the business. They have still got to find it is a regular course of their business. They have still got to find the defendants were doing it for a profit. It does not answer even that element entirely of the offense, but it does say, you know –

MR. KLEIN: I guess it just gets back to our original argument we went over.

THE COURT: It is not different from our original argument. I don't know whether I give it or not, but I know at some point you have got to decide what you are going to do about it.

[p. 1639] MR. KLEIN: I understand.

THE COURT: It gives you something to argue to the Court of Appeals about if your client is convicted. I don't know what they will do with it.

* * *

APPENDIX K

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[p. 1781] Now, I told you that the first element of this offense that the government must establish beyond a reasonable doubt is that a defendant is engaged in the business of selling or transferring obscene matter. Now, as used in this statute, the term, "engaged in the [p. 1782] business," means that the person who sells or transfers or offers to sell or transfer obscene matter devotes time, attention or labor to such activities as a regular course of trade or business with the objective of earning a profit, although it is not necessary that the person make a profit or that the selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income.

"Person" as used in this statute can mean either an individual or a corporation; that is, the statute is applicable to both.

In order to determine whether one is engaged in the business of selling or transferring obscene matter, obviously, a determination must be made as to whether any matter sold or transferred is in fact obscene. You will also be determining whether material is in fact obscene when you decide whether the video tape that is the subject of this prosecution is obscene or not. The instructions that I will give you in a few minutes about the obscenity issue with respect to the video tape in question apply equally to your decisions about whether any material sold or transferred is obscene in connection with determining this element of the offense.

In considering whether a defendant is engaged in the business of selling or transferring obscene [p. 1783] matter, if you find that a person sold or transferred at one time two or more obscene items or two or more copies of an obscene item, you may find that that person is engaged in the business of selling obscene matter. Whether you choose to draw such an inference is strictly up to you.

Under our law materials are presumed to be protected by the First Amendment to the United States Constitution unless and until they are proven to be obscene. In this case you have heard and seen specific proof about the contents of the tape, "Blacks and Blondes, Volume 7," and not about the contents of any other material in the store. Because constitutional protection applies to other materials in the store, you cannot find that they are obscene based on testimony that they were sexually explicit or adult materials.

Now, I have told you that the second element of this offense that the government must show is that a defendant has received or possessed a video tape. "Received" in this statute has its normal and common meaning in the English language. The term possession, however, is one that I must define for you.

The law recognizes two kinds of possession, actual possession and constructive possession. A person who normally has direct physical control over a thing [p. 1784] at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing either directly

or through another person or persons, is then in constructive possession of it.

The law also recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint. You may find that the element of possession as that term is used in these instructions is present if you find beyond a reasonable doubt that a defendant had actual or constructive possession, either alone or jointly with others.

You heard me use the word "knowingly" in this part of the instruction. An act or failure to act is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

Now, the third element of this offense that the government must prove beyond a reasonable doubt is that the video tape in question, "Blacks and Blondes, Volume 7," is obscene. In making that determination, [p. 1785] the following instructions apply. Freedom of expression is fundamental to our system and has contributed much to the development and well-being of our free society. In the exercise of the constitutional right to free expression, which all of us enjoy, sex may be protrayed [sic], and the subject of sex may be discussed freely and publicly so long as the expression does not fall within the area of obscenity. Sexual explicit or adult material is constitutionally protected if it is not obscene.

To establish beyond a reasonable doubt that material is obscene, the government must prove all parts of a three-part test. In order to decide that the video tape in

question is obscene, you must decide that, number one, the main purpose of the material viewed as a whole and considered in relation to the intended and probable recipients is an appeal to the prurient interest in sex of the average person applying contemporary community standards.

Number two, the second part of the test, the material viewed as a whole depicts, shows or describes sexual conduct in a way that is patently offensive to the average person applying contemporary community standards.

Number three, viewing the material as a whole, it lacks serious literary, artistic, political or [p. 1786] scientific value to the reasonable person.

Turning to the first element of the test, a prurient interest in sex is an unhealthy, abnormal, shameful or morbid interest in sex as distinguished from a normal, healthy interest in sex, to most adults in our society. In considering whether the predominant theme or purpose of the material is an appeal to the prurient interest of the average citizen, it is not necessary that the material be found to have actually aroused or excited an average person's unhealthy interest in sex or anyone else's.

Turning to the second element of the test, you have heard me use the word [sic] "patently offensive" in describing for you that part of the test. A depiction of sexual conduct is patently offensive if it depicts hardcore sexual conduct that goes substantially beyond the generally accepted limits of candor so as to be clearly offensive. Patently offensive conduct could include ultimate sexual acts, normal or perverted, actual or simulated, masturbation, excretory function or lewd exhibition of the genitals.

The first two prongs of the three point test require that you apply contemporary community standards from the community from which you come. Contemporary community standards are set by what is in fact accepted [p. 1787] in the community as a whole; that is to say by society at large or people in general and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept. It is a matter of common knowledge that customs change and that the community as a whole may from time to time find acceptable that which was formerly unacceptable, or not infrequently may find presently acceptable that which some particular group of the population may regard as unacceptable.

In determining contemporary community standards, you may consider what is available in the community as a whole through various means of communications.

Also, in considering the first two prongs of the test, your task is to evaluate what judgment would be made by a hypothetical average adult person applying the collective views of the adult community. These questions are not to be determined by the effect of the material on any particularly sensitive or insensitive person, nor on the most prudish or the most tolerant, but rather by the effect on and standards of the average adult who is a synthesis of all men and women.

In deciding what conclusions the average person applying contemporary community standards would breach in these respects, you are entitled to draw on your own [p. 1788] knowledge of the views of the average person in your community. Contemporary community

standards are set by what is acceptable in the community as a whole. In determining these standards, you are to consider the views of all adult members of the community. Obscenity is not a matter of individual taste. The question is not how the material impresses you as an individual, but rather how the average adult person of the community would view it.

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APPENDIX L
Table 4

Individual Attitudes about Acceptability to Obtain and View, Acceptability of Depictions, and Perceptions of Community Tolerance, Before and After Film Viewing for Each Film Group*

1. **Is it** or is it **not** acceptable **to you,** for adults in your community to obtain and view such videos and magazines, if they should want to?

Percent Yes for Acceptance

	Calendar Girl (vol 11)	Blacks and Blondes (vol 7)	Menage a Troix (vol 11)	Nothing in Common	Violent Clips
Before	79%	83%	79%	83%	80%
After	81%	76%	75%	79%	58%

2. Are such **depictions** of nudity and sex in videos and magazines, acceptable or unacceptable **to you,** for adults who want to view them?

Percent Yes for Acceptance

	Calendar Girl (vol 11)	Blacks and Blondes (vol 7)	Menage a Troix (vol 11)	Nothing in Common	Violent Clips
Before	78%	79%	75%	74%	76%
After	77%	76%	67%	79%	50%

* Note that the **After film viewing** questions leave off the word magazine and refer only to the video the individual just viewed. For the **Violent film group** the word *violence* is substituted for the word *sex*.

3. **Is it** or **is it not** tolerated **in your community** for other adults to obtain and view such videos and magazines, if they should want to?

Percent Yes

	Calendar Girl (vol 11)	Blacks and Blondes (vol 7)	Menage a Troix (vol 11)	Nothing in Common	Violent Clips
Before	71%	84%	83%	87%	83%
After	72%	79%	67%	94%	87%

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4. Are such **depictions** of nudity and sex in videos and magazines, tolerated or not tolerated in **your community** for adults who want to view them?

Percent Yes for Tolerated

	Calendar Girl (vol 11)	Blacks and Blondes (vol 7)	Menage a Troix (vol 11)	Nothing in Common	Violent Clips
Before	71%	80%	79%	87%	83%
After	67%	75%	71%	94%	83%

APPENDIX M

* * *

[p. 1109] THE COURT: To make that argument to the jury, and you not only have the opportunity to make it through your cross-examination, through your closing argument, but you had the opportunity through the presentation of your own experts, through whatever else you would want to do. It gets pretty hard for me to see how, unless I think it is just completely misleading or just completely lacks any relevance to this case – I thought that the survey that was done in the **Pryba** case, just had no relevance whatever to the particular case that that jury had to consider. It was like ships passing in the night. This one at least is pretty forthright about – we need to talk about the telephone survey. My comments are pretty much limited to the film evaluation survey at this point, and I have not made a final decision about it. I have also not made a final decision about – I am trying to decide, and I need to look at the Sixth Circuit cases.

[p. 1110] My personal view is that while acceptance is the standard that I would be charging the jury, that evidence of tolerance can be relevant to acceptance, although acceptance is the ultimate issue. That doesn't mean tolerance is irrelevant to a determination of acceptance.

MR. NEWSOM: I don't disagree, Your Honor.

THE COURT: So even if the survey asks about tolerance as opposed to acceptance, then perhaps that's just something for the government to argue about, but there might be a basis, even if you are going to let most of

the questions stand, there might be a basis for excluding the two that specifically addressed – that used the word tolerance, simply because I don't know that I am going to be wanting the defense lawyers to be standing up – I don't want to create a situation in which the jury is going to be led down the path of tolerance so that they forget what the test is. I don't want the test to be misstated to them.

* * *

[p. 1113] THE COURT: What the prosecution and defense lawyers are doing in this context is trying to draw – there is a semantical difference, and the government believes that one term is more acceptable to it and more helpful to it. The defendants believe that another term is more acceptable to them. The point is if you will look at, say – for example, at the definition of community standard in Devitt and Blackmar, it is obvious that although it is phrased in terms of acceptance, and the word tolerance is not used, it is obvious that what is being discussed is to some extent what is tolerated, which is why I say evidence of tolerance is relevant. That does not mean that the test is relevance [sic]. It does not mean –

* * *

[p. 1124] THE COURT: On these Sixth Circuit cases I would point out to you all that two of these cases specifically approve the jury instruction that I propose to give. I'm not sure why we are jockeying around on acceptance vs. tolerance. It would seem to me that at least the Sixth Circuit believes that the precise jury charge I have proposed to give is a correct statement of the law. The

Batista case specifically approves that jury charge, as does the case Mr. Newsom cited.

MR. NEWSOM: Smith.

THE COURT: Smith vs. United States.

[p. 1125] MR. SHAFER: I don't agree that Batista accepts it. What I believe Batista does is raise an argument. Clearly, the jury instruction that is cited there is the jury instruction cited in Smith. What Batista does is make the argument about tolerance, and then they go on to say the argument is misplaced, and what they do is start talking about prurient appeal, as to the material has to be judged by its impact.

THE COURT: If you will notice, the whole issue that was raised on appeal was challenge to that particular jury instruction. That is the precise issue that the court is considering in Batista.

MR. SHAFER: I agree.

THE COURT: For whatever reason they approve it or don't approve it or whatever their reasoning was, you know, that is the precise issue. I think a district judge in the Sixth Circuit would be ill advised and foolhardy to give any other jury instruction on that subject.

MR. SHAFER: How does the Court explain the statement, then, in Peraino?

THE COURT: I think they think what I do, that basically tolerance is just one of the things you consider, and that acceptance in this context does not mean acceptance in the sense of approval. I think [p. 1126] it is just

the nuances of the words, and that is what the Supreme Court is – for every reference to tolerance, you can probably go to those Supreme Court decisions and find comparable oblique references to acceptance as you can in all the other cases – in many other cases, and that is what causes the – it is like you get the government and the defense pulling at two little pieces of – each trying to make their own most desired word –

MR. KLEIN: The State of Indiana in – I am trying to think – Sedelbauer did what the Court talks about. It said it really doesn't matter whether it's acceptance or tolerance so long as they connote it in terms of not meaning acceptance in terms of approval.

THE COURT: Right. It doesn't mean approval in the sense that you have got a board out there or you have got some –

MR. KLEIN: Doesn't have to have to get the majority approval.

THE COURT: Yes, and that's why you find the word, because both things are a factor, and the meaning in this context is not so terribly far apart.

In any event, that gets us back to what you do whether you leave in the questions that use the [p. 1127] word tolerance, since you have already got questions using the word acceptance that are in fact the tolerance question, or whether you let all of them be discussed as part of the questionnaire, and yet no question that directly asks the patent offensiveness question. I assume the experts are going to give an opinion about what the

result show with respect to patent offensiveness, is that not correct?

MR. KLEIN: Correct.

THE COURT: Even if the Court would say this is not the most – the direct question that is necessary to elicit the response on that is not asked. Even though I say that the experts are going to tell me you can form an opinion about patent offensiveness from what is asked, right?

* * *

[p. 1648] MR. KLEIN: I understand.

The next one would be number thirty, and this goes – I understand the court's use of the term acceptance versus tolerance. I am only requesting that where the court does reference the acceptance, that the court put in a paragraph or a sentence explaining to the jury that this does not mean personal approval of the material, but rather acceptance in terms of acceptability for others or in terms of tolerance. The problem I have, Your Honor, is I am fearful of what Mr. Newsom is going to do. He is going to get up [p. 1649] and argue, "The court is going to tell you it is acceptance. They use the word tolerance in the study. The study is meaningless. The court has already ruled that in fact acceptability is interpreted in terms of acceptability for others or interchangeable with tolerance," and I believe the court has to explain that to the jury.

THE COURT: I think the charge is clear on that subject, and I think that Mr. Newsom's point if he makes it is going to be well taken, which is while this study may

tell us something that is relevant to this case, it does not ask every question, or perhaps even the most relevant questions to this case, and I can't stop him from making that argument, because it is an obvious one, and it is also, in my judgment, a correct one. It is not for me to decide but for the jury to decide, but it is a correct one in evaluating the surveys. All you ask those jurors is it okay for other people to do this – all you have asked the survey respondents. You have never asked them the direct question, and that is going to be a big issue in the closing argument. No way I could stop that. No way I can bolster your survey by this charge. I think the charge adequately states the law.

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APPENDIX N

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[p. 1250] Q. Did you ask those ladies and gentlemen who comprised this community according to what you say, did you ask them with regard to, "Blacks and Blondes, Volume 7," is this film acceptable or not acceptable to you, meaning to the persons you were asking?

A. Not in the survey, but in the film evaluation we did. They looked at that film themselves. They evaluated it with regards to not only that that is what they expected to see. They evaluated it with regards to whether it was acceptable to the community or whether it was acceptable to them or it would appeal to a prurient interest or whether it would appeal to their prurient interest, so in the film evaluation it was specifically asked of them, whereas in the survey we are describing in general explicit sexual material and then asking four questions dealing with patent offensive [p. 1251] ness.

Q. Let's back up with regard to your response, Dr. Scott. Number one, your response to my question concerning the telephone survey which you did is no, that question was not asked of those four hundred and seventy-eight people, is that correct?

A. They did not see the movie.

Q. Sir, please respond, then you can explain. Was the question asked of those four hundred seventy-eight people that you surveyed, did you find those [sic] material acceptable or not acceptable to you? Yes or no, you can explain whatever explanation you want to.

A. I read the question –

Q. Yes or no, sir, and then you can explain whatever you want to.

A. Would you repeat the question?

Q. The question is did you ask those four hundred and seventy-eight people, "Was the movie that you saw," or with regard to the survey, was the material that you described to them, "acceptable or not acceptable to you?" Did you ask them that question, sir?

A. Not in the words that you just paraphrased, no.

Q. You told the jury that yes, that question was asked of the people who saw the film, is that correct?

A. That's correct.

[p. 1252] Q. Show me where, Doctor?

A. I don't have a copy of the film survey.

Q. Maybe they can provide you with a copy, and I want you to show me where the people that saw the film were asked that question.

MR. KLEIN: May I approach the witness, Your Honor (passing document to the witness).

A. It was asked in a variety of ways starting with –

Q. Excuse me just a minute.

MR. KLEIN: May he respond to the question?

THE COURT: I think the question is whether that particular question is in the survey.

Q. Is that question in the survey or not? After you answer the question, you can give any explanation you want to.

A. The question, "Is it or is it not acceptable to you?"

Q. Yes.

A. Yes, it is.

Q. Would you state to us what question it is and read the question to the jury and Court.

A. The question number four: "Is it or is it not acceptable to you for adults in your community to obtain and view the video, "Blacks and Blondes, Volume 7," if they should want to?"

[p. 1253] Q. That is not a question to them concerning – whether that film is acceptable to them. It is a question of toleration whether it is acceptable to them or not that somebody else can purchase that film, is that right, Doctor?

A. It is a question as to what is acceptable to them. That is exactly what it says. "Is it or is it not acceptable to you for adults in your community to obtain and view this video if they should want to?"

Q. Right, sir. The question was asked, but you didn't stop with, "Is it acceptable or not acceptable to you," did you, Doctor? You continued on?

A. We continued on.

Q. Was the question asked of those people in that, anywhere in that film survey, after looking at that film themselves, and simply ask the simple question to that person who saw the film, "Is this film acceptable or not acceptable to you?" Was that question asked, Doctor?

A. I don't believe it was in stopping right there. It was asked in a variety of ways where other things after that were asked.

Q. We'll talk about those variety of ways in just a second, Doctor, but as far as that particular question, would you agree with me that is a pretty simple question [p. 1254] pretty simple, straightforward question, isn't it, Doctor?

A. Your question?

Q. Yes.

A. Yes, it is pretty simple, I would say.

Q. But you didn't ask that, did you?

A. There were a lot of questions we didn't ask. We could go on in finitum. The people spent almost an hour filling out questionnaires with lots of different questions.

Q. I'm not a social scientist, Doctor, but it seems to me if you want to find out what the average person in our community thinks about that film, whether it is acceptable or not, you simply ask them –

MR. KLEIN: Your Honor, I object to him making a speech. If he wants to ask a question, let him ask a question instead of making a speech to the jury.

THE COURT: I think we need to ask a question if you have one.

Q. Do you think that would be an appropriate question to ask these people in light of what you know these jurors have to decide in this case, Doctor?

A. I think the question we asked might be even more helpful to the jury, because that is the question, as I [p. 1255] understand it, that the Court is going to ask this jury whether people out in this community are willing to accept and tolerate sexual depictions such as in, "Blacks and Blondes, Volume 7."

Q. I think you are right, Doctor, about that assumption, but go ahead.

A. As I understand it, the jury is going to be informed not to use their own values but those of the average person in the community.

Q. You are correct about that, sir.

A. And what we are asking here is the people themselves, the random sample, is it or is it not acceptable to them, to you, for the adults in this community to look at those materials.

Q. But the question, though, the test is whether or not – you are trying to say either acceptable or not acceptable to them, this type material. If you had the community out there in your form [sic] of your little random sample, why didn't you ask them is it acceptable or not acceptable to you?

A. Another way would be –

Q. Why didn't you do that, sir?

A. May I explain?

Q. Yes, sir.

A. I think our goal here was to determine what is [p. 1256] acceptable to the average person in this community. It is not whether the person necessarily likes that material or dislikes the material. It is whether they are willing to accept that material, that person is willing to accept it for other people who may or may choose not to view it. For example, maybe the best analogy I could give is I do not like violent material. I simply don't.

MR. NEWSOM: Your Honor please, I object to this response.

THE COURT: This is not responsive to the question.

A. I am trying to give an example to clarify –

MR. NEWSOM: You are trying to make a speech to this jury is what you are doing –

THE COURT: Mr. Newsom, I have told the witness he is not responsible. Now, let's move on.

* * *

[p. 1260] Q. Specifically, if these people thought that – the people being the telephone survey, the four hundred and seventy-eight households that you did contact, whether or not they thought the material was clearly offensive, you didn't ask that question? You didn't ask the question whether or not it was acceptable to them themselves, is that correct? I think we cleared [p. 1261] that. Both of those you did not ask, is that right?

A. We did ask if it is acceptable to them for adults in their community to obtain and view it.

Q. I understand, but is it or is it not an entirely different question than the question I am asking?

A. If you want is it acceptable to them, we didn't ask that. We asked if it was acceptable to them for other people to obtain and view it.

Q. Is it the whole purpose of the survey to find out whether this material is accepted or not accepted in this community?

A. That's correct.

Q. Isn't the easiest way to do is ask if it is accepted or not accepted to them, them being the community?

A. We are doing that, but we are doing that, number one, by asking this question and then by showing them the material and asking them once again to determine based on viewing the material.

Q. Let's look at the question, number nineteen. Is that the first one that you say is applicable to your ultimate conclusion concerning this particular film?

A. Yes, it is.

Q. How does that question read, Doctor?

A. "Is it or is it not acceptable to you for adults in your community to obtain and view such videos and [p. 1262] magazines if they should want to?"

Q. That is a question of toleration, isn't it, Doctor?

A. No, in my opinion it is a question of acceptability.

Q. You are using the term acceptability. You are using the term is it acceptable to you, but is what acceptable? Not if the film is acceptable, but is it acceptable to you for somebody else to go out and buy this film? Isn't that what you are asking, Doctor?

A. That is exactly right.

Q. Is that not toleration?

A. No.

Q. You are asking this person, "Will you tolerate somebody else going out and buying the film?" Isn't that the same question in different wording, Doctor?

A. If I had said, "Is it or is it not tolerated by you," that would be to measure toleration. If I said, "Is it or is it not acceptable to you," that is a question whether it is acceptable to them. In my opinion they are two different questions.

Q. Is what acceptable or not acceptable?

A. The question of whether it is acceptable to them for adults in their community to go out and obtain and view this type material.

Q. Which, in other words, is do they tolerate it, [p. 1263] Doctor?

A. Not to me as a social scientist. To you as a lawyer, maybe. Not to me. To me that is acceptable to them whether they are willing to accept other people in the community to do this.

Q. But it is not a measure of acceptability of that person as to that particular film, is it, Doctor?

A. No, as to that film as to what they are willing to allow other people to view.

Q. I used the term toleration. What you just described would be toleration to me, Doctor, but let's move on rather than get into semantics. What about the next question?

A. The next question is "Are such depictions of nudity and sex in videos and magazines acceptable or not acceptable to you for adults who want to view them?"

Q. That is another toleration question, is it not, Doctor?

A. Absolutely not, not in my opinion.

Q. What are you asking that person?

A. I am asking specifically are such depictions of nudity and sex, both with people in the questionnaire – are such depictions of nudity and sex in videos and magazines acceptable or unacceptable to you for adults who want to view them.

[p. 1264] Q. For who [sic] adults who want to view them. I agree with you, Doctor, if you had stopped with, "acceptable or not acceptable to you," period, or question mark. That would have been a relevant question, but when you continue on and say, "For adults who want to view them," you are really asking that question is it acceptable or not to you for somebody else to go out and buy this material, is it not, Doctor?

A. That is exactly what we are trying to measure as to whether that person, it is acceptable to them for other adults to view this material or not.

Q. That is exactly what you are trying to measure, Doctor. What this jury has to measure is the acceptability or nonacceptability of that film in the community.

What is the next question you asked?

A. The next question is: "Is it or is it not tolerated in your community for other adults to obtain and view such videos and magazines if they should want to?"

Q. Are you going to argue with me that is not a toleration question, or do you think that is a toleration question?

A. When I say tolerate, I mean tolerate, and when I said tolerate, you can be sure I mean tolerate.

Q. That question right there, Doctor, the same [p. 1265] question. It elicits the same information as the two above it, does it not, Doctor?

A. If it elicited the same response, we would have the identical same numbers, and the numbers are substantially different if you look at the numbers I reported on direct examination, I think they are representing different things.

Q. That question doesn't ask whether or not that material is acceptable or not acceptable to that individual, does it, Doctor?

A. No, it asks is it or is it not tolerated.

Q. For other individuals?

A. In your community for other adults.

Q. To purchase that material?

A. Exactly.

Q. What is the final, the fourth and final question?

A. "Are such depictions of nudity and sex in videos and magazines tolerated or not tolerated in your community for adults who want to view them?"

Q. Again, is it asking for their opinion concerning toleration of other people who might want to purchase that material, right, sir?

A. Exactly.

Q. Would you agree with me, Doctor, that all four of those questions are asking the same thing?

[p. 1266] A. No. I have already said that, I think, several times.

Q. Does that fourth question ask – is it a question asking the person is this material acceptable or not acceptable to you?

A. No, it asks them is it tolerated.

Q. Those are the only four questions, as I understand your direct testimony, those are the only four questions that go specifically to the question of community standards and patent offensiveness, is that right?

A. That's correct. The only four questions in the telephone survey, although there are other questions in the film evaluation that addressed that.

Q. Let me ask you this. let's stick with this same area here. We are talking about those four questions. The identical four questions were asked in the preinterview of the film survey, were they not?

A. Yes, they were.

Q. So your response would be that these same four questions were asked of the people, the – how many people came up and saw the film?

A. I think it was one hundred and twenty-three.

Q. Of those one hundred and twenty-three people, they were asked those same questions, is that right?

A. Before they viewed the film, that's correct.

[p. 1267] Q. And none of those four contained the question do you find this material acceptable or not, is that correct?

A. Two questions asked is it or is it not acceptable to you for other adult [sic] to obtain and view this material, or are these depictions acceptable or not acceptable.

Q. And is that not a different question than the question I just asked you?

A. Two questions deal with tolerance in my opinion, and two deal with acceptance.

Q. Acceptance of what, Doctor?

A. Acceptance or not acceptance of other adults viewing this material or these depictions or descriptions being viewed.

Q. Exactly. All four questions in the telephone survey and all four questions in the prefilm survey the prequestionnaire to the film survey, goes to what they tolerate other people doing, but none of them –

A. No, that is not correct.

Q. How is it incorrect?

A. It specifically says is it or is it not acceptable to you.

Q. For other people to do that.

A. Exactly. That is precisely correct.

[p. 1268] Q. With regard to the after viewing of the film, essentially, those same four questions were asked, except they were personalized with regard to the film?

A. That's correct.

Q. But it is still the same four questions, isn't it?

A. They are the same four questions with reference to the film.

* * *

APPENDIX O

* * *

[p. 1441] Q. Did you ask them – I'm not going to say did you. You didn't ask them these four questions, did you, Doctor? You didn't ask them after viewing that film, "Now, Mr. or Mrs. whoever you are who just viewed, "Blacks and Blondes," do you find this film acceptable or unacceptable?" Did you ask them that question, Doctor?

A. Didn't have to. No, we did not.

Q. I didn't ask you if you had to, Doctor.

A. No, we did not.

* * *

APPENDIX P

* * *

[p. 1675] " . . . In deciding what conclusion the average person applying the contemporary community standards would reach in this respect, you are entitled to draw upon your own knowledge of the views of the average person in your community. Contemporary community standards are set by what is accepted by the community as a whole." Then she goes on with some more instructions.

She will define for you what is prurient interest and patent offensiveness. With regard to prurient appeal, I believe she will tell you that turning to the first element in the three prongs of the Miller test, the first element is a prurient interest. A prurient interest is an unhealthy, abnormal, shameful or morbid interest in sex as distinguished from a normal, healthy interest in sex, to most adults in our society. She will tell you that in considering whether the predominant theme or purpose of the material is an appeal to the prurient interest of the average person, it is not necessary that the material be found to arouse or excite – excuse me. To have actually aroused or excited the average person's unhealthy interest in [p. 1676] sex or anyone else's unhealthy interest in sex."

With regard to patent offensiveness, I believe the judge will tell you that the term patent offensiveness is a depicting of sexual conduct is patently offensive if it depicts hardcore sexual conduct that goes substantially beyond the general accepted limits of candor so as to be clearly offensive.

Ladies and Gentlemen, when you apply the – you as the jurors – what all that means, or what I am telling you that means, and we will see if the judge tells you the same thing, that you as the jury are going to decide the question of obscenity with regard to this video tape by doing the following. You have a right in deciding this case to use your own knowledge of your community, the community from which you come, and decide in your own mind who the average person in your community is. You project yourself to that average person, and ask the average person in my community, number one, would he find, he or she, would they find that this film, the depictions in it, are clearly offensive considering the film as a whole. Number two, would they find, would that average person in my community, find that this film, the contents of it appeals to a prurient and unhealthy, shameful, morbid interest in sex, considering the intended recipient of [p. 1677] that film and considering it as a whole. Would it have that kind of appeal. It is not the sexual acts in the film itself, but are they represented in a patently offensive way. Are they represented in a clearly offensive way that goes beyond what is accepted in the community.

Now, these defendants have brought in four experts, and they have shown you this survey, this telephone survey of four hundred seventy-eight people, they have shown you this film survey of one hundred twenty-three people, and they say, and they have a right to bring in experts and have a right for those experts to give you their opinion, and those experts, two of those experts, Ed Donnerstein, and Joe Scott, have given you their opinion concerning two of those three prongs of the Miller standard. One, they have told you that based upon their

survey that they feel that this particular film, "Blacks and Blondes," would not appeal to a prurient interest of the average person in this community, and second, they have told you that this particular film is not patently offensive; that it would be accepted, in other words, in this community. They have said for that reason, of course, that you Ladies and Gentlemen can't find this film, that this film is obscene.

[p. 1678] Now, the Court will tell you there is no obligation of the United States to call any expert witness in an obscenity trial to prove anything; that once the material itself is put into evidence, that the jury can consider that material itself in making the determination of obscenity. You can rely upon the material itself and upon your own knowledge of who the average person would be in this community.

I want to talk to you for a minute about this survey and what this survey really does. They say that this survey, the methodology used on it is state of the art. It is absolutely – you can't punch holes in it. They tried it every way, and therefore, it is foolproof. Let me ask you something, though, rhetorically, of course, but what did they find out about this survey? What I would like for you Ladies and Gentlemen to do is take this exhibit, when you go back to deliberate, you take Exhibit 39, which is their film review survey, and I want you to look at it carefully with regard to certain things. Look at it carefully with regard to the whole thing, but specifically, I want to point out certain things. It ties in also to this telephone survey they did.

You remember those six questions we talked about? If you look at those questions, specifically [p. 1679] the first four of the six – you remember there were four of them that the defendants said apply to whether or not the material is patently offensive, and the other two, the last two apply to whether or not it had any kind of prurient appeal. I will submit to you, Ladies and Gentlemen, if you look at what is actually asked by those first four questions, you will see that what the defendants have asked is you, Mr. Respondent, what we are asking you is is it acceptable or not acceptable for other people to have this material, to purchase this material in your community. I would submit to you that is a question concerning toleration. Then the other – looking at all four questions, all four of them are essentially the same thing. They are asking the person do you tolerate this particular type of material in your community.

Ladies and Gentlemen, please remember this. The test is this case is not toleration. That is not the issue, whether or not it is tolerated. The fact that the material in itself is in the community is a circumstances [sic] that can certainly be considered, but that is not the ultimate test as to whether or not this material has been accepted or not, because the test, as I mentioned to you a moment ago, the judge will charge you is what is in fact acceptable in this community.

[p. 1680] Let me tell you a little bit. The point is this. Look at those four questions, the first four, and you will see that all four of them are truly asking the individual what they will put up with regard to this. It is okay with them that other adults buy this material. You remember when Dr. Joe Scott got up there the first day when they

had the first expert witness, and I got up to cross-examine him, and I asked Dr. Scott – I'm not a social scientist, Ladies and Gentlemen, but what the defendants are saying is here, Ladies and Gentlemen, we have gone out, and we have got this community for you, and we are going to tell you what the community actually thinks about this film. If that is the truth, Ladies and Gentlemen, I will submit to you what they would have done is they would have gone out, and they would have got this representative sample of the community. I want you to bear in mind one thing. You as jurors have to project what the average person in the community would think. These people they had are not jurors. These people are, as they say, the community itself, so you wouldn't be asking the community itself what somebody else thinks. You would be asking the community itself what they think. so the relevant question should have been posed to these people, this representative sample, "Do you after viewing this [p. 1681] film, "Blacks and Blondes, Volume 7," is this acceptable to you or not?" Very simple question. They would have said, "Yes, it is acceptable to me," or, "No, it is not acceptable to me."

Then there were three other questions about was it appropriate or inappropriate. Specifically, Ladies and Gentlemen, I am reading – this is Exhibit 39 for the record, and I am reading the four questions that were asked, but not to the people who saw, "Blacks and Blondes." They were asked to the control group, these four questions were. They were asked to the people who saw the violent clips, but they were not asked – they were specifically deliberately not asked of the people who were in this survey who saw, "Blacks and Blondes."

The question starts out, with the lead-in, "Below are a list of words that could be used to describe this type of violent film. Please circle the number that best describes this film." Then they have, "Unacceptable," and then they have a scale all the way over, and they have got, "Acceptable." Then they have, "Objectionable," and then a scale all the way over to, "Unobjectionable." they have, "unsuitable for most people to view," and then they have a scale all the way to, "Suitable for most people to view." They [p. 1682] have an, "Inappropriate," and have a scale all the way over to, "Appropriate."

Those, Ladies and Gentlemen, are relevant questions if asked to the people who saw, "Blacks and Blondes." If the defendants had asked those questions then you probably would have a true something to go on about what this community actually thinks about, "Black and Blondes." You would have had people who they say is a representative sample saying, "Yes, it is acceptable to me." Then I would submit to you the defendants have given you something that you can use in making your determination that you can truly use in making the determination of this film. But what is so obvious, Ladies and Gentlemen, and please know this, it is not a situation where they didn't think to ask these questions, because obviously, they did ask the questions. They asked them of everybody else but the people that we are concerned with. That is the ones who saw, "Blacks and Blondes."

Now, why did they do that? You remember I asked Dr. Scott, I kept asking Dr. Scott before I even noticed that they had in fact asked the other groups and had deliberately omitted those questions to our group, I was asking Dr. Scott, "Why didn't you ask these questions?" He said,

"Well, we did." Then he kept [p. 1683] referring back to the first four questions where they said, "Is it acceptable or unacceptable to you that other adults in your community." If they had stopped with that, "Is it acceptable or unacceptable to you," period, that would be one question, but, "Is it acceptable or unacceptable to you for other people to do it," that is not the same question, Ladies and Gentlemen. Yet these experts get up there and they say – they end up with yes, that so much percentage is found acceptable. So much is found – do you see what I'm saying? You have got to say when they say acceptance, you have got to say what is acceptable? What is it that the person really answered? What is the answer given by that person? What were they really saying here? You don't just say well, what is acceptable or not acceptable. You have got to look at the actual questions asked and the answers given.

Let's go back to what I said a while ago. Why didn't they ask those four simple questions to the people who saw, "Blacks and Blondes"? I would submit to you, Ladies and Gentlemen, because if they had, they wouldn't be in here testifying. They wouldn't be in here testifying. I would submit to you that the answer contrary to what Mr. Donnerstein tells you, that the answers to those questions would have been, "No, that [p. 1684] film is not acceptable to me."

Let me give you an example of the difference, Ladies and Gentlemen, between acceptance and tolerance so it is perfectly clear in your mind. I know a lady who has three children, and her husband runs around on her, and he goes out with other women. She knows it. She knows that. She tolerates that, because she has to have his

income to support her children, but does she accept that conduct? Absolutely not. Absolutely not. That is the difference in what I am talking to you about, Ladies and Gentlemen. The fact that somebody in this community may tolerate the presence of something like this is one question, but that is not the test. It is whether this community has accepted this material, the average person. That is the true relevant issue that you have got to decide in your mind, and if these defendants truly wanted to assist you in making that decision, those other questions would have been asked.

Now, do you recall what Dr. Donnerstein did when I asked him why weren't those questions asked? Do you recall? It was on direct examination that Mr. Klein said, "Well, you didn't ask them about whether it was simply acceptable, did you Doctor?" They knew where I was going to be coming from when I got up on [p. 1685] cross-examination, so in anticipation of that they wanted the doctor to explain to you or give some kind of explanation as to why those questions weren't asked, so Mr. Klein says, "Well, you didn't just ask the group whether it was acceptable or not?" The doctor said, "Oh, no that would be unacceptable." Do you remember when he said that? "That would be unacceptable." "That question would be unacceptable." If it is unacceptable, Ladies and Gentlemen, why did he ask it to the control group, and why did he ask it to the people who saw the violent film?

Then when we asked him to really get down and explain it, I sat down and let him talk to you, but I don't know what he said, because he didn't give you an answer that can be made sense of, Ladies and Gentlemen.

Then he tries to tell you, well, but we can extrapolate from what these other answers are and come to the conclusion of what the answers would have been. Why have to do that when they could have simply asked the people outright, and then there wouldn't be any question in your mind as to what the answers would be. Again, it's not because they forgot to. They deliberately didn't ask those questions, because they knew what the answer, the true answer would be, Ladies and Gentleman, and they would not have been able to go up in this court- [p. 1686] room and testify for the defense.

I may have brought him in here to testify for the government if those questions had been asked with regard to the community standards. So I want you to please remember that, and when you look through this survey, I want you to remember – don't get confused and look at these surveys. They have got them mixed up in different tables, and so forth, but if you look you will see very clearly, and I think I brought it out on cross-examination, that the survey used for the people before they saw, "Blacks and Blondes," does not include those questions. The specific survey that was used after the people who saw, "Blacks and Blondes," did not contain those four questions, but every other question in there did.

* * *

[p. 1693] Those are all things you have to consider again in the validity of this survey. When I say the validity, what I am talking about is what does this survey really show, because when you get right down to it, the only question that was really asked was, "Do you tolerate this, other people getting this in the community?" That is

the only relevance to this whole lawsuit is that one question, and that is not the test.

* * *

APPENDIX Q

Name Ronald J Caldwell

Please answer the following questions. Do not consult with anyone else in answering the questions or discuss your answers or show them to anyone else. If you do not understand a question or questions or cannot write your answers, tell the judge. If you need extra space for a question, finish your answer on the back of a page.

1. Do you own a video cassette recorder or other device on which you can view movies at home?

Yes ___ No X

2. Are you a member of a video club?

Yes ___ No X

3. If you do not own a device as described in question 1, have you viewed movies on such a device owned by someone else?

Yes ___ No X

If so, please explain.

4. If you have viewed movies in your own home or someone else's home, what movies have you seen? If the number of movies you have seen exceeds ten (10), list the last ten (10) movies you have seen. Otherwise, list all movies you have seen in a home.

None

5. Other than movies you have seen at home, what are the last five movies you have seen?

None

6. Do you read any magazines and newspapers on a regular basis?

Yes X No ___

If so, what magazines and newspapers do you read?

Truckin Mini Truckin Country Music City News

7. Do you watch television on a regular basis?

Yes X No ___

If so, what programs do you watch?

Sports Country Music TNN ESPN & TBS & Some cinemax & hbo

8. Have you ever subscribed to an adult pay or cable television station?

Yes X No ___

9. Do you read books?

Yes X No ___

What books have you read in the last year?

Truckin & Mini Truckin

10. Do you attend any cultural, musical or artistic events?

Yes ___ No X

If so, what events have you attended in the last year?

None

11. Are you a member of any religious organization, including a church, synagogue or other group?

Yes X No ___

If so, of what group are you a member?

Lamar Heights Baptist Church

If you are a member, how often do you attend meetings of your group or organization? Not to [sic] often due to work schedule

If you are a member, do you hold any offices or other positions within your organization? No

How long have you been a member? Don't remember Been some time

12. If you are not a member of a religious organization, do you nevertheless attend services or meetings of such an organization?

Yes ___ No X

If so, what is the organization and how often do you attend?

None

If you are not a member of a religious organization and have attended meetings of more than one organization, please list all meetings attended and the organization involved in each meeting in the last five years. None

13. Have you ever seen a movie that you considered to be sexually explicit?

Yes X No ___

If so, what movie or movies have you seen?

Deep Throat

When and under what circumstances did you see it (them)?

At a movie

What sexually explicit conduct was included in the movie or movies? Everything

14. Have you seen or read books or magazines that you considered to be sexually explicit?

Yes ___ No X

If so, what books and magazines have [sic] seen or read?

None

When did you see or read them? None

What sexually explicit conduct was included in the books or magazines? None

15. Have you ever seen a television program that you considered to be sexually explicit?

Yes X No ___

If so, what program or programs have you seen?

showtime The Movie Channel HBO & cinemax

When did you see it (them)? About 9 mos ago

What sexually explicit conduct was included?

Everything except penetration

16. Have you ever attended a live performance of any type that included nudity?

Yes ___ No X

If yes, please give the name of the performance(s).

17. Have you ever been to an establishment described as an adult establishment?

Yes ___ No X

If yes, please describe. None

18. Have you been personally offended by the sexual content of any movie, television program, book, magazine or performance you have seen?

Yes X No ___

If yes, please describe. Need to take off T.V. & Movies. Not good for little children to see.

19. Has any organization of any type with which you are affiliated taken a position with respect to obscenity, pornography or sexually explicit movies, plays, concerts, books, magazines or other material?

Yes ___ No X

If so, what is the organization? None

What is its position? None

Do you agree with that position? None

Have you ever taken any action to represent or advocate that position?

Yes ___ No X

If so what?

20. Have you received literature from any organization that has taken a position for or against obscenity, pornography and/or live nude entertainment?

Yes ___ No X

If yes, please describe. None

21. Have you or a family member taken any action to support or oppose an organization taking a position regarding obscenity or pornography or sexually explicit material?

Yes ___ No X

If yes, please describe. None

22. Have you ever participated in a group or organization taking a position regarding

a. schoolroom reading materials? Yes ___ No X
b. record lyrics? Yes ___ No X
c. what books should be in libraries? Yes ___ No X
d. lyrics or behavior of groups in concerts? Yes ___ No X
e. sex education in schools? Yes ___ No X
f. movie ratings? Yes ___ No X
g. record ratings? Yes ___ No X

h. removal of magazines such as "Playboy," "Penthouse," or "Hustler" from neighborhood convenience stores? Yes ___ No X

i. bottomless or topless dancing? Yes ___ No X

j. rights of homosexuals or lesbians? Yes ___ No X

k. any other issue involving homosexuality or lesbianism? Yes ___ No X

l. prostitution? Yes ___ No X

Have you every supported or opposed the activities of such a group or organization?

Yes ___ No X

If your answer to any of the above questions is yes, please describe.

23. Have you or your family members ever taken any action to support or oppose obscenity, pornography or a sexually explicit movie, book, play, concert, magazine or other material?

Yes ___ No X

If yes, please describe the action taken.

24. Have you ever attended a meeting at which obscenity, pornography, sexually explicit materials or any of the topics listed in question 22 were discussed?

Yes ___ No X

If yes, please describe.

25. Have you read or seen anythings [sic] in the news media or otherwise about adult attitudes in this country about sexually explicit material?

Yes ___ No X

If so, please describe.

Have you discussed with anyone adult attitudes in this country toward sexually explicit materials?

Yes X No ___

If so, please describe.

Some of the men at work

Have you done any research of any type, formal or informal, about attitudes in this country toward sexually explicit materials?

Yes ___ No X

If so, please describe.

26. The film that is the subject of this prosecution portrays the following conduct: sexual intercourse; cunnilingus (Webster's definition: oral stimulation of female genitalia); fellatio (Webster: oral stimulation of penis, often to ejaculation); severing of a penis with a knife.

Do you think that the viewing of any of this conduct will be personally offensive to you?

Yes X No ___

If so, what?

This kind of stuff need not be shown anywhere in this country because little children have eyes too

Even if some of the film's subject matter is offensive to you, can you view the entire film, hear the other evidence in the case, discuss the evidence with your fellow jurors during deliberation, and otherwise sit as a member of this jury and render a fair and impartial verdict?

Yes ___ No X

Can you deliberate, following the judge's instruction that you will not be following your own personal standard, but the objective standards of the community?

Yes X No ___

27. Some of the sexual conduct in the movies occurs between individuals of different races, specifically between black men and white women.

Would you find the movie personally offensive because it involves inter-racial sexual conduct?

Yes X No ___

If yes, can you put aside any personal feeling you have and consider whether the movie is obscene in accord with the judge's instructions, without consideration of the races of the individuals involved?

Yes X No ___

28. The movie also includes profane language and the consumption of alcoholic beverages. Would this influence your ability to sit as a juror and render an impartial verdict in this case?

Yes ___ No X

29. What is your age? 41

30. If you are single, have you previously been married?

Yes X No ___

If yes, please give the dates of any prior marriage (or marriages) and specify whether it ended in divorce, annulment or death of a spouse. 7/22/69 Been married for nearly 21 yrs. to the same woman who I married

31. If you are married, have you previously been married to someone other than your current spouse?

Yes ___ No X

If yes, please give the dates of any prior marriage (or marriages) and specify whether it ended in divorce, annulment or death of a spouse. None

32. Have you ever resided in the same household in a sexual relationship with someone to whom you were not married?

Yes X No ___

33. Do you have a personal view about whether the government should regulate or prohibit obscenity?

Yes X No ___

If yes, what is your view?

Should be against the law all the way

Have you ever publicly advocated your view?
At work

Notwithstanding any personal view about what the law is or should be in this area, can you follow the law as the judge states it to you?

Yes X No ___

The laws for the criminal. But you let me do something like this and the law would hang me for something like this. Should not mix interracial in movies or anything else.

What's this world coming to.

It ought to be against the law of this land for any kind of dirty movie made in this country

APPENDIX R

* * *

[p. 302] THE COURT: Okay. Thank you. Mr. Caldwell, would you come up here, please, sir?

Mr. Caldwell, you have indicated in [p. 303] response to question twenty-six, which is the question concerning the content of the film that's the subject of this case, you have indicated first that you find some – That you would find the viewing of some of this conduct personally offensive or all of it.

And then you have said in response to the question: Even if some of the film's subject matter is offensive to you, can you view the entire film, hear the other evidence in the case, discuss it with your fellow jurors and otherwise sit as a member of the jury and render a fair and impartial verdict. And you indicated you feel you cannot do that, is that correct?

MR. CALDWELL: Uh-huh.

THE COURT: You believe you could not sit as a fair and impartial juror in this case?

MR. CALDWELL: Yes, Interracial has a lot to do with it.

THE COURT: I was going to ask you about that. I gather you feel that you could not consider the case – You have indicated some fairly strong views on the last page concerning obscenity. And then you also referred to the fact that the sexual content and conduct in this case is between individuals of [p. 304] different races, you have mentioned that again.

MR. CALDWELL: Uh-huh.

THE COURT: The consideration whether this film is obscene is going to have nothing whatsoever to do with whether or not the conduct portrayed is between people of different races, that's just not a part of your consideration. But do you feel that you can not be a fair and impartial juror?

MR. CALDWELL: Yeah, I could.

THE COURT: You could be a fair an [sic] impartial juror?

MR. CALDWELL: Yes.

THE COURT: All right. Let's back up just a minute. Okay. You have indicated you are bothered by – are you bothered by the fact that the sexual conduct would be between individuals of different races?

MR. CALDWELL: Uh-huh, it would be on that part.

THE COURT: Okay, that bothers you? Well, can you still consider the case and put that out of your mind?

MR. CALDWELL: Yeah, I could. I would.

THE COURT: What about this answer to question twenty-six where you have indicated that you could [p. 305] not. This question is, even if some of the film's subject matter is offensive to you, could you view the entire film, hear the other evidence in the case and discuss it with your fellow jurors and otherwise sit as a member of the jury and render a fair and impartial verdict? And you said, no, to that. Is that your answer that you could not do that?

MR. CALDWELL: Yeah, I could.

THE COURT: You could do that? So is your answer to that –

MR. CALDWELL: I understand not to discuss this at all anyway.

THE COURT: Not until the end of the case, but when you get through?

MR. CALDWELL: Well, I misunderstood then.

THE COURT: When you get through, you are going to have to talk to your fellow jurors while you are deliberating. And what I am concerned about is whether people who might find some of the content of the film personally offensive are still going to be able to sit here and watch the entire movie and listen to the other evidence in the case and go back there and deliberate with the other members of the jury –

MR. CALDWELL: I could, yes.

[p. 306] THE COURT: – Talk abut the evidence and render a fair and impartial verdict in the case?

MR. CALDWELL: Yes. yeah, I can do that.

THE COURT: Okay. Can you do that without considering in any way the fact that some of the sexual conduct is between black people and white people, specifically, between black men and white woman [sic]? Can you do that?

MR. CALDWELL: Yeah, I can.

THE COURT: You don't have any concern with that?

MR. CALDWELL: No, I don't have any doubt in my mind.

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(2)

No. 91-1582

Supreme Court, U.S.
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JUN 10 1992
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In the Supreme Court of the United States

OCTOBER TERM, 1991

ELLWEST STEREO THEATRES OF MEMPHIS, INC., dba EXECUTIVE SOUTH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the rebuttable presumption in 18 U.S.C. 1466(b) violates due process.

2. Whether, under the facts of this case, a rational jury could infer that petitioners were engaged in the business of selling obscene matter because they offered two copies of an obscene item for sale at one time.

3. Whether the definition of "engaged in the business" in 18 U.S.C. 1466 is unconstitutionally vague.

4. Whether instructing the jury on the basis of a permissive inference after petitioners rested their case precluded them from presenting evidence to rebut the inference.

5. Whether the district court's jury instructions on the application of "contemporary community standards" were correct.

6. Whether the district court properly refused to excuse a prospective juror for cause.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Commonwealth v. *United Books, Inc.*, 453 N.E.2d 406 (Mass. 1983)	13
Dunlap v. *State*, 728 S.W.2d 1555 (Ark.), cert. denied, 484 U.S. 852 (1987)	14
Francis v. *Franklin*, 471 U.S. 307 (1985)	9
Grayned v. *City of Rockford*, 408 U.S. 104 (1972)	10
Kolender v. *Lawson*, 461 U.S. 352 (1983)	10
Leech v. *American Booksellers Ass'n*, 582 S.W.2d 738 (Tenn. 1979)	15
Miller v. *California*, 413 U.S. 15 (1973)	4, 8, 11, 15
New York v. *Ferber*, 458 U.S. 747 (1982)	11
People v. *Ford*, 773 P.2d 1059 (Colo. 1989)	14
Pope v. *Illinois*, 481 U.S. 497 (1987)	15
Sedelbauer v. *State*, 428 N.E.2d 206 (Ind. 1981), cert. denied, 455 U.S. 1035 (1982)	12, 14
Smith v. *United States*, 431 U.S. 291 (1977)	7-8, 15
State v. *Short*, 368 So. 2d 1078 (La.), cert. denied, 444 U.S. 884 (1979)	14
State v. *Taylor*, 664 P.2d 439 (Utah 1983)	13
State ex rel. Collins v. *Superior Court*, 787 P.2d 1042 (Ariz. 1986)	13
Ulster County Court v. *Allen*, 442 U.S. 140 (1979)	9
United States v. *Battista*, 646 F.2d 237 (6th Cir.), cert. denied, 454 U.S. 1046 (1981)	12, 14
United States v. *Day*, 476 F.2d 562 (6th Cir. 1973)	7
United States v. *Easley*, 927 F.2d 1442 (8th Cir.), cert. denied, 112 S. Ct. 199 (1991)	12, 14

Cases—Continued: Page

United States v. *Leary*, 395 U.S. 6 (1969) 7
United States v. *Peraino*, 645 F.2d 548 (6th Cir. 1981) 13
United States v. *Petrov*, 747 F.2d 824 (2d Cir. 1984), cert. denied, 471 U.S. 1025 (1985) 13-14
United States v. *Pryba*, 900 F.2d 748 (4th Cir.), cert. denied, 111 S. Ct. 305 (1990) 12, 14
United States v. *Various Articles of Obscene Merchandise*, 600 F.2d 394 (2d Cir. 1979) 13
United States v. *Various Articles of Obscene Merchandise*, 709 F.2d 132 (2d Cir. 1983) 14
United States v. *Womack*, 509 F.2d 368 (D.C. Cir. 1974), cert. denied, 422 U.S. 1022 (1975) 14

Constitution, statutes and rule:

U.S. Const. Amend. I 11, 14, 15
18 U.S.C. 921(a)(21) 10
18 U.S.C. 1466 ..... 2, 3, 10
18 U.S.C. 1466(b) 3, 7, 8, 10

Miscellaneous:

134 Cong. Rec. E3752 (daily ed. Nov. 10, 1988) 10
Webster's Third New International Dictionary (1986) 12

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1582

ELLWEST STEREO THEATRES OF MEMPHIS, INC., dba EXECUTIVE SOUTH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-13, is unpublished, but the judgment is noted at 952 F.2d 404 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1992. A petition for rehearing was denied on February 27, 1992. Pet. App. 14-15. The petition for a writ of certiorari was filed on March 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioners were convicted of engaging in the business of selling obscene matter, in violation of 18 U.S.C. 1466.[1] Petitioner Ellwest Stereo Theatres of Memphis, Inc. (Ellwest) was fined $50,000. Petitioner Charles Long was sentenced to 20 months in prison, to be followed by two years of supervised release, and he was fined $7,500. Petitioner Rodney Skinner was sentenced to 18 months in prison, to be followed by two years of supervised release, and he was fined $2,000. Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. 1-13.

---

[1] 18 U.S.C. 1466 (1988) provided:

(a) Whoever is engaged in the business of selling or transferring obscene matter, who knowingly receives or possesses with intent to distribute any obscene book, magazine, picture, paper, film, videotape, or phonograph or other audio recording, which has been shipped or transported in interstate or foreign commerce, shall be punished [according to law].

(b) As used in this subsection, the term "engaged in the business" means that the person who sells or transfers or offers to sell or transfer obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit, although it is not necessary that the person make a profit or that the selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income. The offering for sale of or to transfer, at one time, two or more copies of any obscene publication, or two or more of any obscene article, or a combined total of five or more such publications and articles, shall create a rebuttable presumption that the person so offering them is "engaged in the business" as defined in subsection (b).

1. Ellwest owns and operates three adult bookstores in Memphis, Tennessee. Long was the president of Ellwest. Skinner was the secretary of the corporation and the manager of its three stores. Each store had a front portion where sexually explicit magazines and videotapes were sold, and a back portion where patrons could watch sexually explicit "peep shows" on videotape. On August 17, 1989, a Memphis police sergeant randomly selected and purchased a videotape entitled "Blacks and Blondes Vol. 7" at one of Ellwest's stores. A few hours later, a second Memphis police officer bought another copy of the same videotape at the same store. Pet. App. 2; Gov't C.A. Br. 4-7.

2. In response to a written juror questionnaire, prospective juror Ronald Caldwell indicated that he would find some of the contents of the film at issue personally offensive, but that he would be able to put aside his feelings and render a fair and impartial verdict. Pet. App. 93-96. The district court examined Caldwell at length about his responses. Pet. App. 97-100. Based on Caldwell's assurances that he could render a fair and impartial verdict and obey the court's instructions, the court refused to excuse him for cause. Petitioners subsequently exercised a peremptory challenge against Caldwell. Pet. App. 7-8; Gov't. C.A. Br. 34-37.

Prior to trial, petitioners moved to dismiss the indictment on the ground that the phrases "engaged in the business" and "regular course of trade or business" in 18 U.S.C. 1466 were unconstitutionally vague. The district court denied the motion. Pet. App. 19-28.

At trial, the district court ruled, Pet. 36-47, that Section 1466(b) employs an unconstitutional manda-

tory presumption to the extent that it provides, "The offering for sale of or to transfer, at one time, * * * two or more of any obscene article, * * * shall create a rebuttable presumption that the person so offering them is 'engaged in the business'." Rather than applying the statutory presumption, the district court charged the jury:

> In considering whether a defendant is engaged in the business of selling or transferring obscene matter, if you find that a person sold or transferred at one time two or more obscene items or two or more copies of an obscene item, you may find that that person is engaged in the business of selling obscene matter. Whether you choose to draw such an inference is strictly up to you.

Pet. App. 49.

Consistent with *Miller* v. *California*, 413 U.S. 15, 24-25 (1973), the district court also charged the jury:

> In order to decide that the video tape in question is obscene, you must decide that, number one, the main purpose of the material viewed as a whole and considered in relation to the intended and probable recipients is an appeal to the prurient interest in sex of the average person applying contemporary community standards.
>
> Number two, the second part of the test, the material viewed as a whole depicts, shows or describes sexual conduct in a way that is patently offensive to the average person applying contemporary community standards.
>
> Number three, viewing the material as a whole, it lacks serious literary, artistic, political or scientific value to the reasonable person.

Pet. App. 50-51.

The court's instructions further emphasized to the jury that "[t]he first two prongs of the three point test require that you apply contemporary community standards from the community from which you come." Pet. App. 52. The court elaborated as follows on that requirement:

> Contemporary community standards are set by what is in fact accepted in the community as a whole; that is to say by society at large or people in general and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept. It is a matter of common knowledge that customs change and that the community as a whole may from time to time find acceptable that which was formerly unacceptable, or not infrequently may find presently acceptable that which some particular group of the population may regard as unacceptable.
>
> In determining contemporary community standards, you may consider what is available in the community as a whole through various means of communications.
>
> Also, in considering the first two prongs of the test, your task is to evaluate what judgment would be made by a hypothetical average adult person applying the collective views of the adult community. These questions are not to be determined by the effect of the material on any particularly sensitive or insensitive person, nor on the most prudish or the most tolerant, but rather by the effect on and standards of the average adult who is a synthesis of all men and women.
>
> In deciding what conclusions the average person applying contemporary community standards would []reach in these respects, you are entitled to draw on your own knowledge of the

> views of the average person in your community. Contemporary community standards are set by what is acceptable in the community as a whole. In determining these standards, you are to consider the views of all adult members of the community. Obscenity is not a matter of individual taste. The question is not how the material impresses you as an individual, but rather how the average adult person of the community would view it.

Id. at 52-53.

3. After the jury returned its verdict, petitioners moved for judgments of acquittal or a new trial. The court rejected their claim that the court improperly forced them to use a peremptory challenge by not excusing venireman Ronald Caldwell for cause. The court noted that Caldwell had assured the court of his ability to be fair and impartial, and that, in any case, petitioners "were given two additional [peremptory] challenges during the jury selection process." Pet. App. 29-30.

The court also held that the timing of its decision to give an instruction on a permissive inference did not preclude petitioners from presenting evidence that the materials in their store, other than the videotapes purchased by the police, were not obscene. Pet. App. 32. The court noted that petitioners made their decision about what evidence to present with full knowledge that "the court had not made a definite ruling on the presumption issue," and that when the court issued its ruling, petitioners "did not ask to reopen their proof." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-13. The court did not consider petitioners' challenge to the constitutionality of the rebuttable presumption in

18 U.S.C. 1466(b), because the trial court had instructed the jury in terms of a permissive inference. Pet. App. 3-4. The court of appeals approved that instruction: "Since it is more likely than not that the sale of two obscene films indicates that an individual is engaged in the business of selling obscene matter, the inference suggested to the jury passes the rationality test outlined in [*United States* v. *Leary*, 395 U.S. 6, 36 (1969)]." Pet. App. 5.

The court of appeals next rejected petitioners' claim that the statutory term "engaged in the business" is unconstitutionally vague. The court noted that it had rejected a similar challenge to the federal firearms statute. Pet. App. 6 (citing *United States* v. *Day*, 476 F.2d 562, 567 (6th Cir. 1973)). The court added that "the 'two sale' definition found in the statute * * * unequivocally puts the public on notice of the level of activity that will support the drawing of an inference that an individual is engaged in the business of selling obscene material." Pet. App. 6.

The court of appeals also affirmed the district court's decision not to exclude juror Caldwell for cause. Pet. App. 6-8. The court noted that petitioners "were not entitled to a jury comprised of persons who approved of the content of the videotape," and it held that the district court "was warranted in concluding that this juror could set his personal convictions to one side and obey the court's instructions." *Id.* at 8.

Finally, the court of appeals rejected the contention that the district court improperly instructed the jury that the term "contemporary community standards" requires the jury to consider what is accepted, rather than what is tolerated, in the community. Pet. App. 8-9. The court acknowledged that dictum in *Smith*

v. *United States*, 431 U.S. 291, 305 (1977), discussed contemporary community standards in terms of the jury's understanding of the tolerance of the average person in the community. "Despite this language," the court held, "there is nothing in *Smith* that indicates that the Court intended to modify the seminal test outlined in *Miller v. California*, 413 U.S. 15, 32 (1973), which uses 'acceptance' language." Pet. App. 9.[2]

ARGUMENT

1. Petitioners contend that 18 U.S.C. 1466(b) violates due process because it contains a rebuttable presumption that a person is engaged in the business of selling obscene materials if he has sold two or more obscene items at one time. Pet. 4-6. The district court agreed that the presumption was unconstitutional; hence, the court instructed the jury only in terms of an inference—it instructed the jury that it could, but did not have to, infer that petitioners were engaged in the business of selling obscene material if it found that they had sold two or more obscene items at one time. Pet. App. 49. Because the district court agreed with petitioners' challenge to the rebuttable presumption and therefore did not instruct in terms of a presumption, the court of appeals correctly refused, *id.* at 4, to address the question whether the use of a rebuttable presumption violates due process. That issue is therefore not properly before this Court.

2. Petitioners contend that the district court violated due process by instructing the jury that it could, but did not have to, find that petitioners were engaged in the business of selling obscene materials if it found

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[2] The court also observed that the relevant portion of the jury charge was "taken verbatim from *Federal Jury Practice and Instructions*, § 62.07 (West 1977)." Pet. App. 9.

that petitioners sold two or more obscene items at one time. Pet. 6-9. As this Court has explained, however, such a permissive inference "violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury.' *Francis* v. *Franklin*, 471 U.S. 307, 314-315 (1985). Because a permissive inference "leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *Ulster County Court* v. *Allen*, 442 U.S. 140, 157 (1979).

The court of appeals properly upheld the permissive inference on which the jury was instructed. Pet. App. 5. Common experience suggests that the offering for sale of two or more identical items at the same time suggests that the seller is in the business of selling those items. While there may be other explanations for a person's offering multiple copies of a particular item for sale, it is certainly rational for a finder of fact to infer from evidence of multiple sales of identical items that the seller is engaged in the trade of selling the items. Moreover, the circumstances of this case strongly supported that inference. Petitioners operated several stores in which sexually explicit materials were sold and exhibited in "peep shows," and the police officers who purchased the two copies of the videotape selected it at random. Gov't C.A. Br. 5-6. All of those facts are consistent with—indeed, they compel—the conclusion that petitioners were engaged in the business of selling the items that the police purchased at this store. Hence, "under the facts of the case," *Ulster County*, 442 U.S. at 157,

the jury could rationally infer that offering two copies of an obscene videotape for sale at one time showed that petitioners were engaged in the business of selling obscene material. In the absence of any authority holding that the use of a permissive inference under Section 1466 violates due process, further review is unwarranted.

3. Petitioners next contend that the term "engaged in the business" in 18 U.S.C. 1466 is unconstitutionally vague. Pet. 9-12. A penal statute must define an offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); see *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). The detailed and explicit definitions in 18 U.S.C. 1466 satisfy that requirement. Section 1466(b) defines the phrase "engaged in the business" to apply to "the person who sells or transfers or offers to sell or transfer obscene matter[,] devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit, although it is not necessary that the person make a profit or that the selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income." In addition, the definition of "engaged in the business" is patterned on the definition of the same phrase in the federal firearms statute. See 18 U.S.C. 921(a)(21); 134 Cong. Rec. E3752 (daily ed. Nov. 10, 1988) (remarks of Rep. Hughes). Hence, there is an existing body of law that informs the meaning of term "engaged in the business." Finally, as the court of appeals noted, Section 1466's reference to the sale of two items of obscenity puts the public on notice that that level of

activity can support an inference that a person is engaged in the business of selling obscenity. Pet. App. 6. Petitioners' claim does not warrant further review.

4. Petitioners contend that the timing of the district court's decision to instruct the jury on a permissive inference precluded them from presenting evidence to rebut that inference. Pet. 12-14. The record does not support that claim. Although the district court did not rule on the permissive inference instruction until after petitioners presented their case, petitioners knew that the court had "reserved the constitutional issue [regarding the presumption] for later determination." Pet. App. 32. Moreover, "when the court made its ultimate ruling on the presumption issue, [petitioners] did not ask to reopen their proof to present evidence concerning the materials in the store other than the movie that was the subject of the indictment." *Ibid.* The district court therefore properly concluded that petitioners' decision not to present any evidence about the other materials sold in their store was the product of trial strategy, and not the timing of the district court's ruling.

5. Petitioners also contend, Pet. 17-26, that the district court's instructions improperly defined "contemporary community standards" in terms of what is accepted, rather than what is tolerated, in the community as a whole. As petitioners concede, Pet. 18, however, this Court has alternatively referred to community "acceptance" or "toleration" of sexually explicit materials without suggesting that the two concepts are materially different. See, *e.g.*, *Miller* v. *California*, 413 U.S. 15, 32 (1973) (First Amendment does not require "that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City"); *New York* v. *Ferber*, 458 U.S. 747, 761 n.12 (1982)

(same). A jury instruction referring to "acceptability" rather than "tolerability" therefore satisfies the constitutionally approved definition of obscenity. See, *e.g.*, *United States* v. *Easley*, 927 F.2d 1442, 1446-1447 (8th Cir.), cert. denied, 112 S. Ct. 199 (1991); *United States* v. *Pryba*, 900 F.2d 748, 758-759 (4th Cir.), cert. denied, 111 S. Ct. 305 (1990); *United States* v. *Battista*, 646 F.2d 237, 245-246 (6th Cir.), cert. denied, 454 U.S. 1046 (1981); *Sedelbauer* v. *State*, 428 N.E.2d 206, 210-211 (Ind. 1981), cert. denied, 455 U.S. 1035 (1982).

In any case, use of the word "accept," rather than "tolerate," could not have made a difference in light of the entire jury charge in this case. Among the definitions of "accept" is "to take without protest; endure or tolerate with patience." *Webster's Third New International Dictionary* 10 (1986). In the context of the jury charge as a whole, it is evident that the term "accept" was used in that sense, rather than to suggest affirmative approval by the community. First, the instructions made clear that the jury was to evaluate what was "accepted in the community as a whole," and "not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept." Pet. App. 52. The use of the term "accept" in reference to an entire community cannot reasonably be understood to mean that the entire community must embrace the sexually explicit materials at issue; rather, it can sensibly be viewed only as requiring an evaluation of what the community at large would tolerate in its midst.

In addition, the court instructed that community standards "are not to be determined by the effect of the material on any particularly sensitive or insensitive person, nor on the most prudish or the most tolerant, but rather by the effect on and standards of

the average adult who is a synthesis of all men and women." Pet. App. 52. By referring to the "effect" of the materials on the average adult, and directing the jury not to consider the "the most tolerant" hypothetical member of the community, the charge can only be understood to require the jury to consider what the average member of the community would be able to tolerate, not what the average member would personally approve of or embrace. Thus, even if this Court's decisions required a charge that conveys the concept of tolerance, the jury charge given in this case would satisfy that requirement.

Finally, petitioners contend that the lower courts are in conflict over whether a jury in an obscenity case must be instructed to consider community tolerance, and not acceptance, of sexually explicit material. Pet. 21-22 & nn.17-20. Petitioners, however, have not cited, and we are unaware of, any court of appeals or state supreme court decision that conflicts with the unpublished decision below. Petitioners cite a number of cases that refer to the concept of community tolerance in passing, without addressing the issue raised here—whether an instruction that mentions and elaborates upon acceptability is constitutionally sufficient.[3] As petitioners concede, many of the cases they cite, like the decisions of this Court, refer interchangeably to tolerability and acceptability.[4] And

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[3] See, *e.g.*, *United States* v. *Peraino*, 645 F.2d 548, 551 (6th Cir. 1981); *United States* v. *Various Articles of Obscene Merchandise*, 600 F.2d 394, 406 (2d Cir. 1979); *State ex rel. Collins* v. *Superior Court*, 787 P.2d 1042, 1047-1049 (Ariz. 1986); *Commonwealth* v. *United Books, Inc.*, 453 N.E.2d 406, 410 (Mass. 1983); *State* v. *Taylor*, 664 P.2d 439, 448 (Utah 1983).

[4] See, *e.g.*, *United States* v. *Petrov*, 747 F.2d 824, 831 (2d Cir. 1984) ("A key issue in any obscentity case is the degree

numerous other decisions have explicitly rejected the argument that an instruction referring to acceptability is inconsistent with the First Amendment decisions of this Court.[5]

It is true that the Colorado Supreme Court has required a tolerance standard instead of an acceptance standard, but the court explicitly rested its holdings on the Colorado Constitution, which "extends broader protection to freedom of expression than does the first amendment to the United States Constitution." *People* v. *Ford*, 773 P.2d 1059, 1066 (Colo. 1989). The Tennessee Supreme Court, moreover, invalidated a state statute that determined what was

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of community acceptance or toleration of materials similar to those at issue."), cert. denied, 471 U.S. 1025 (1985); *United States* v. *Various Articles of Obscene Merchandise*, 709 F.2d 132, 136 (2d Cir. 1983) (alternatively discussing the "measure of community tolerance" and question whether materials "are acceptable to the average member of the community"); *United States* v. *Womack*, 509 F.2d 368, 379 (D.C. Cir. 1974) (referring alternatively to "community tolerance" and "community acceptance"), cert. denied, 422 U.S. 1022 (1975); *Dunlap* v. *State*, 728 S.W.2d 155, 160-161 (Ark.) (referring to "acceptance of * * * material" and to "evidence that community standards would tolerate the materials"), cert. denied, 484 U.S. 852 (1987); *State* v. *Short*, 368 So. 2d 1078, 1083 (La.) ("There was no other evidence of community acceptance or toleration, which * * * would have been material to the case."), cert. denied, 444 U.S. 884 (1979).

[5] *Easley*, 927 F.2d at 1446-1447; *Pryba*, 900 F.2d at 758-759; *Battista*, 646 F.2d at 245-246; *Sedelbaurer*, 428 N.E.2d at 210-211. Petitioners also suggest that there is a conflict among the state and federal courts concerning whether an instruction may refer to standards of "decency," rather than standards of community "tolerance." Pet. 21-22. Because the jury instruction in this case did not refer to a standard of decency, however, this case is not an appropriate vehicle for addressing the validity of an instruction that uses that term.

patently offensive in terms of what was "personally acceptable" to an average person. *Leech* v. *American Booksellers Ass'n*, 582 S.W.2d 738, 748 (Tenn. 1979). While the Tennessee Supreme Court analyzed federal cases interpreting the First Amendment, it ultimately concluded that "[i]ndependent of the United States Constitution," the reference to what is "personally acceptable" violated the Tennessee Constitution. *Ibid.* In any case, as discussed, the instruction here clearly does not call for the jury to find that an average member of the community would personally accept the materials at issue. Because there is no conflict in authority on the issue raised by petitioners, further review is unwarranted.[6]

6. Finally, petitioners contend that the district court improperly refused to excuse juror Caldwell for cause. Pet. 26-27. As the court of appeals explained, however, the district court did not abuse its discretion in overruling the challenge for cause, because Caldwell indicated that he "could set his personal convictions to one side and obey the court's instructions." Pet. App. 8. Petitioners' disagreement with the district court's exercise of discretion, based upon its observation of the juror and consideration of his assurances, does not warrant this Court's review.

---

[6] Petitioners also argue, Pet. 15-17, that the concept of what is "accepted" in the community has no place in the determination of whether material appeals to the prurient interest. This Court, however, has made clear that contemporary community standards are relevant in determining whether material appeals to the prurient interest. *Miller* v. *California*, 413 U.S. at 24; *Smith* v. *United States*, 431 U.S. 291, 299-301 (1977); *Pope* v. *Illinois*, 481 U.S. 497, 500 (1987). Petitioners have cited no decision holding that a definition of community standards such as the one in this case is inappropriate in determining whether particular material appeals to the prurient interest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-1582

In The

Supreme Court of the United States

October Term, 1991

ELLWEST STEREO THEATRES OF MEMPHIS, INC., d/b/a EXECUTIVE SOUTH, CHARLES LONG, AND RODNEY SKINNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

ARGUMENT 1

APPENDIX

APPENDIX S ..... App. 101

APPENDIX T ..... App. 104

INDEX OF AUTHORITIES

Page

CASES

Andrews v. State, 652 S.W.2d 370 (Tex. Cr. App. 1983) 5, 8

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 6

Brown v. State, 274 S.E.2d 572 (Ga. App. 1980) 8

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 5

Leech v. American Booksellers Ass'n, 582 S.W.2d 738 (Tenn. 1979) 9

Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) 6

Miller v. United States, 413 U.S. 15 (1973) 9

134 Baker Street, Inc. v. State, 324 S.E.2d 575 (Ga. App. 1984) 8

People v. Ford, 773 P.2d 1059 (Colo. 1989) 9

People v. North Street Book Shoppe, Inc., 530 N.Y.S.2d 869 (N.Y. App. 1980) 9

People v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348 (Colo. 1985) 5, 9

Roth v. United States, 354 U.S. 476 (1957) 6

Sandstrom v. Montana, 442 U.S. 510 (1979) 3

Sedelbauer v. State, 428 N.E.2d 206 (Ind. 1981) 8

Ulster County Court v. Allen, 442 U.S. 140 (1979) 3

United States v. Various Articles of Obscene Merchandise Schedule No. 1769, 600 F.2d 394 (2nd Cir. 1979) 9

INDEX OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. § 921 3

18 U.S.C. § 1466 ..... 1, 3

OTHER AUTHORITIES

Lentz, *Comparison Evidence in Obscenity Trials,* 15:1 Mich. Journal of Law Reform (Fall 1981) 45, at 66 5

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Supreme Court of the United States

October Term, 1991

ELLWEST STEREO THEATRES OF MEMPHIS, INC., d/b/a EXECUTIVE SOUTH, CHARLES LONG, AND RODNEY SKINNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

1. Although the government apparently concedes that the newest federal obscenity statute, 18 U.S.C. §1466, is unconstitutional as written, it asserts that the statute's constitutionality is not properly before this Court since the district court acknowledged the invalidity of the presumption, and instructed the jury with, rather, a permissive inference. Opp. Br. 8. This ignores, however, the inherent vagueness of the remaining statute without the invalid presumption (as will be discussed, ***infra***), as well as the issue of whether the trial below should have even occurred at all.

The district court below overruled pretrial motions to dismiss the indictments predicated upon the unconstitutionality of the charging statute, on the mistaken belief that

the mandatory presumption was constitutional. App. E(24). The fact that the court only *later* finally acknowledged the unconstitutionality of the mandatory presumption, and instructed the jury instead with a "permissive inference," does not address the more pointed issue as to whether or not the indictments should have been dismissed prior to trial (or following conclusion of the Government's case), as being founded upon an unconstitutional statute. As this issue was properly raised by way of pretrial, trial, and post-trial motions, and was also raised before the Sixth Circuit, this issue *is* "properly before this Court."

2. The Government next contends that the instructed permissive inference does not offend due process because "[c]ommon experience suggests that the offering for sale of two or more identical items at the same time suggests that the seller is in the business of selling those items." Opp. Br. 9. Yet, merely because Defendants might have sold the two materials still does not answer the question as to whether they are "*engaged in the business*" of selling or transferring *obscene* matter "as a *regular course* of trade or business" (it is and must be, after all, a *rebuttable* inference). In addition, because the mandatory "presumption" is unconstitutional, and therefore lends no support to the "inference" charge, the true issue must be whether the court could have charged the permissive inference *if the criteria of the mandatory presumption had never existed.* The answer is clearly that she could have not.

The Government reaches the opposite conclusion, by blurring the line between protected expression and criminal obscenity, in claiming that the circumstances of this case "strongly supported" the inference because:

> "Petitioners operated several stores in which *sexually explicit materials* were sold and exhibited in "peep shows," and the police officers who purchased the two copies of the videotape selected it at random." Opp. Br. 9 (emphasis added).

Thus, the Government improperly *presumes* all "sexually explicit materials" to be *obscene,* even though the statute does not criminalize (and could not constitutionally do so – see

Pet. 7-8) one who is "engaged in the business" of selling or transferring "*sexually explicit materials*" as a regular course of trade or business.[1]

3. The government asserts that the phrase "engaged in the business" has sufficient standards, *and thus provides fair notice,* because of the "reference to the sale of two items" as found in the mandatory presumption. Opp. Br. 10. Yet, because the mandatory presumption is unconstitutional, and thus that criteria is therefore void *ab initio,* to argue that the statute provides sufficient standards and fair notice (particularly when the record in this case unequivocally establishes that even the trial court was not sure as to who could be charged with violating this statute – Pet. 10-11), defies credibility.[2]

4. The Government's contention that the "record" does not support the claim that the trial court's late decision to instruct the jury with a permissive inference precluded Defendants from presenting evidence to rebut the inference (Opp. Br. 11), is erroneous. See Pet. App. H(36-38), and Pet. App. I(44). In fact, defense counsel indicated that the decision *not* to put on the additional evidence as to the other materials at Ellwest was predicated upon the court's decision on the

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[1] The Government also relies heavily upon ***Ulster County Court v. Allen,*** 442 U.S. 140 (1979). ***Ulster*** is, however, irrelevant for a number of reasons. First, ***Ulster*** involved an "as applied" challenge as opposed to the facial challenge permissible here because of the potential impact upon First Amendment rights. ***Id.,*** at 155. Second, unlike in ***Ulster,*** the *statutory* presumption at issue here is of the "conclusive or persuasion-shifting variety." ***Sandstrom v. Montana,*** 442 U.S. 510, 519 n.9 (1979). Third, and probably most importantly, ***Ulster*** did not involve a facially unconstitutional presumption as is the case here. Fourth, the statutory inference at issue in ***Ulster*** is simply not analogous to the rebuttable presumption as found within 18 U.S.C. §1466(b).

[2] As noted in the Petition (at 10), because firearms cannot constitutionally be analogized to the distinction between constitutionally protected expressive materials and criminal obscenity, the government's reliance upon the federal firearms statute, 18 U.S.C. §921(a)(21) (Opp. Br. 10), is unavailing.

unconstitutionality of the mandatory presumption. Pet. App. H(37).[3]

5. The Government asserts that the jury instruction regarding "acceptance," rather than the defense argued standard of "tolerance," could not have made a difference in light of the entire jury charge since the term "accept":

> "Cannot reasonably be understood to mean that the entire community must embrace the sexually explicit materials at issue; rather, it can sensibly be viewed only as requiring an evaluation of what the community at large would *tolerate* in its midst." Opp. Br. at 12 (emphasis added).

By this statement, and by other remarks here (*see* Opp. Br. at 12-14), the Government surprisingly concedes that Defendants' position as to the conceptualization of patent offensiveness (Pet. 23-26) is indeed correct. Yet, the Government's conclusion that the jury charge could not possibly be understood to mean a standard of "personal" acceptance or "approval" (which it for the first time now apparently concedes are unconstitutional standards), is incorrect.[4]

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[3] Any assertion that this argument is somehow waived because Defendants had not motioned the court to reopen their proofs is unavailing, since the trial court's decision was made in a jury charge conference only minutes before closing arguments, and thus would have afforded no opportunity to prepare additional evidence, and in any event, the prosecution had previously requested to reopen its proofs, which was denied by the trial court. (Reply App. S). It is reasonable to conclude that any request from the Defendants would have met a similar fate, particularly given the district court's strong pre-trial statements of disdain of Defendants' theory of rebutting the presumption/inference. See Reply App. T.

[4] Respondent also argues, Opp. Br. 14-15 n.5, that the conflict of utilizing a standard of "decency" as opposed to the concept of "tolerance" should not be considered here because the jury instruction in this action did not refer to a standard of "decency." This conclusion is wrong for two reasons. First, the fundamental issue here is the appropriate (and indeed constitutional) operational definition of the term "patent offensiveness." "Decency" is simply one of the choices utilized by courts and

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First, the Government supports its position by noting that the jury was instructed that they were to consider what was "accepted in the community as a whole," and "not by what some persons or groups of persons may *believe* the community as a whole *ought* to accept or refuse to accept." Opp. Br. 12. Yet, because the abstraction of "community standards" is simply a synthesis of the individual opinions from adult community members, merely because the jury was instructed that it was not to consider what *some* people believe *ought* to be accepted, adds nothing to supposedly clarify to the jury that it was to consider what the community "at large would tolerate in its midst." This is particularly true since the naked term "acceptability" is not a "self-defining concept" (Lentz, *Comparison Evidence in Obscenity Trials,* 15:1 Mich. Journal of Law Reform (Fall 1981) 45, at 66). Indeed, as will be discussed below, the jury was unquestionably led to believe that it was to determine the community standards by evaluating what *individuals* in the community would *themselves* "accept"; not what they would "tolerate."

Second, the Government claims that the jury could not have been mislead because it was also instructed not to determine community standards based upon the *effect* of the material on any particularly sensitive person or group, but, rather, by the effect upon the average adult. Opp. Br. 12-13. While the Government does not explain this leap of faith, this observation is erroneous not only for the reason that the opinion or the "average" adult still must be determined on the basis of a composite of opinions of *personal* acceptance, but for the additional reason that the "effect" of the material only

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legislatures. Second, and more importantly, "decency" has been equated by a number of courts, including this one, to a standard of "acceptance." ***FCC v. Pacifica Foundation,*** 438 U.S. 726, 739-740 & n.14 (1978); ***People v. Seven Thirty-Five East Colfax,*** 697 P.2d 348, 360 (Colo. 1985); and ***Andrews v. State,*** 652 S.W.2d 370, 377, 379 (Tex. Cr. App. 1983).

relates to the concept of "prurient appeal," and not "patent offensiveness."[5]

In addition, to assert that the jury could not have understood the charge to mean a standard of "personal" acceptance or "approval," belies the record below. From the very beginning of this litigation, the Government had argued that the proper standard for adjudicating obscenity was indeed that of "personal" acceptance or "approval."[6] The Government also raised the exact same argument in the Sixth Circuit by asserting that "[t]he dichotomy between toleration and *personal acceptance* of the average person is a line which must be *carefully drawn and the division created by it strictly observed.*" Gov't C.A. Br. 20 (emphasis added).

The Government was also able to exploit this "strictly observed" "division" in cross-examination of Defendants' expert witnesses (Pet. 25-26; Pet. App. N(62-65, 67-70), and O(75)), and in summation to the jury. Therefore, the Government's position seems to now be that although it successfully argued below that "tolerance" and "acceptance" were distinct concepts (with the jury charge supporting this assertion),[7]

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[5] ***Roth v. United States,*** 354 U.S. 476, 489-490 (1957); ***Manual Enterprises, Inc. v. Day,*** 370 U.S. 478, 482-483, 487-488 (1962); and ***Brockett v. Spokane Arcades, Inc.,*** 472 U.S. 491, 498-501 (1985).

[6] United States' Motion in Limine to Limit Appeal to Prurient Interest and Patent Offensiveness Test to an Acceptance and not a Toleration Standard, at 2-3; Motion in Limine and Memorandum of Law in Support of Motion in Limine, at 24-26, 29-31, and 38.

[7] The Government also contends that the jury charge must have been construed to provide for a "tolerance" standard because at least one dictionary definition equates tolerance and acceptance (Opp. Br. 12). Yet, the Government submitted *different* "dictionary definitions" of "tolerate" and "toleration" to convince the trial court that such a standard could *not* be utilized to conceptualize the standard of "approval." Motion in Limine and Memorandum of Law in Support of Motion in Limine, at 26 n.6.

which then allowed it to assert in closing that all submitted defense evidence was irrelevant as being predicated upon an inappropriate "tolerance" standard,[8] and although it won

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[8] Because of the trial court's refusal to make a pretrial ruling on the "tolerance"/"acceptance" issue, the community standards surveys submitted for the defense asked some questions regarding "tolerance," and some regarding "acceptance." The two questions utilizing the "acceptance" standard asked:

> "1. *Is it* or is it *not* acceptable *to you*, for adults in your community to obtain and view such videos and magazines, if they should want to?
>
> 2. Are such *depictions* of nudity and sex in videos and magazines, acceptable or unacceptable *to you*, for adults who want to view them?" (Emphasis in original)

The prosecutor argued to the jury that such questions were really (and improperly) a standard of "tolerance." *See* Pet. App. P(79) ["if you look at what is actually asked by those first four questions, you will see that what the defendants have asked is you, Mr. Respondent, what we are asking you is is it acceptable or not acceptable *for other people to have this material, to purchase this material in your community.* I would submit to you that is a question concerning *toleration. . . . Ladies and Gentlemen, please remember this. The test in this case is not toleration. That is not the issue, whether or not it is tolerated."];* (80) [" . . . the relevant question should have been posed to these people, this representative sample, 'Do you after viewing this film . . . *is this acceptable to you or not?'* Very simple question. They would have said, 'Yes,' it is acceptable to me, or, 'No, it is not acceptable to me.' "]; (81) [same]; (82) ["If they had stopped with that, 'Is it acceptable or unacceptable to you,' period, that would be one question, but, 'Is it acceptable or unacceptable to you for other people to do it,' *that is not the same question Ladies and Gentlemen.*"]; (83) [*"The fact that somebody in this community may tolerate the presence of something like this is one question, but that is not the test.* It is whether this community has accepted this material, the average person."]; (84-85) ["when you get right down to it, the only question that was really asked was, 'Do you tolerate this, other people getting this in the community?' That is the only relevance to this whole lawsuit is that one question *and that is not the test.*"]. Thus, the exact standard as acknowledged by the Government before this Court to be appropriate was specifically repudiated by the U.S. attorney at trial.

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convictions predicated upon this distinction, that even though it *now* concedes Defendants' argument is the correct legal position, no harmful or constitutional error occurred. This is obviously erroneous.

Most telling of this issue is the fact that defense counsel requested that the jury simply be instructed that the standard of "acceptance" did not mean "personal approval of the material, but rather acceptance in terms of acceptability for others or in terms of tolerance." Pet. App. M(60). The court, however, refused this request which, as illustrated by n.8, ***supra,*** allowed the U.S. Attorney to argue "personal" acceptance and "approval" in closing. Therefore, it is unavailing to argue that the jurors could not, and did not believe "acceptance" to be anything but a standard of "personal" acceptance or "approval"; standards which the Government now concedes are constitutionally infirm.[9]

The Government also asserts that there is not "any court of appeals or state supreme court decision that conflicts with the unpublished decision below" with regard to the propriety of a *jury charge* of acceptance. Opp. Br. 13. This is surely an

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Thus, the Government now argues here that the jury charge could not have been construed to mean *exactly* as the U.S. attorney was arguing to the jury that it, in fact, meant.

[9] There is also an unquestionable *perception* that "tolerance" and "acceptance" are different. For the prosecutors, *see* Weaver, Handbook on the Prosecution of Obscenity Cases, National Obscenity Law Center (1985), at 12; and *The Preparation and Trial of an Obscenity Case; A Guide for the Prosecuting Attorney,* 2d Ed., Citizens for Decency through Law, Inc., 1988, at 22. For the Defendants, *see for example,* ***134 Baker Street, Inc. v. State,*** 324 S.E.2d at 575, 576 (Ga. App. 1984); ***Brown v. State,*** 274 S.E.2d 572, 574 (Ga. App. 1980); and ***Sedelbauer v. State,*** 428 N.E.2d 206, 210-211 (Ind. 1981). *See also* Scott, *Obscenity and the Law: Is it Possible for a Jury to Apply Contemporary Community Standards in Determining Obscenity?,* 14 Law and Human Behavior No.2, 139 (1990), at 140 n.1. *Compare* ***Andrews,*** 652 S.W.2d at 380. Given the instruction solely of "acceptance," there is no reason to believe that jurors would perceive the concepts any less differently.

unfair reading of the case law as cited in the Petition (at 21 n.17), which include many decisions that while not specifically deciding the issue as to the propriety of *jury instructions*, consider the "tolerance"/"acceptance" debate in detail and nevertheless reject a standard of "acceptance" for adjudicating obscenity.[10] Finally, this conflict of the proper operational definition of "patent offensiveness" has lead one circuit to note that, because of lack of direction from this Court, "[i]t has largely been left to us, then, the inferior federal courts, to infer the meaning of the term 'patent offensiveness.' " ***United States v. Various Articles of Obscene Merchandise Schedule No. 1769,*** 600 F.2d 394, 402 (2nd Cir. 1979). Review by this Court is therefore warranted.

Respectfully submitted,

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[10] *See also* ***People v. North Street Book Shoppe, Inc.***, 530 N.Y.S.2d 869, 872 (N.Y. App. 1980). In addition, the Government erroneously implies (Opp. Br. 15) that ***Leech v. American Booksellers Ass'n,*** 582 S.W.2d 738 (Tenn. 1979) was decided solely upon state constitutional grounds, when, in fact, that court noted that the standards of "acceptance" and "approval" violated federal constitutional law under ***Miller*** as well. ***Id.***, at 748. Similarly, the Government's citation to ***People v. Ford,*** 773 P.2d 1059 (Colo. 1989) is unavailing for the Colorado Supreme Court had declared "tolerance" to be an appropriate standard pursuant to the federal Constitution, as well as their state constitution. ***Id.***, at 1063-1064; and ***Seven Thirty-Five East Colfax, Inc.***, 697 P.2d at 360-361.

APPENDIX S

[p. 1386] (Whereupon, the hearing of the cause was resumed on this, the 9th day of May, 1990, at 10:15 a.m.)

MR. NEWSOM: May I ask a question, Your Honor?

THE COURT: All right.

MR. NEWSOM: If Your Honor please, I know Your Honor has not made a ruling yet concerning – I assume. I don't know. Has Your Honor made a ruling yet concerning constitutionality of the –

THE COURT: I have denied the motion for judgment of acquittal. We are not going to discuss that right now.

MR. NEWSOM: That's fine, Your Honor.

THE COURT: I just want to move through these experts.

MR. NEWSOM: I have no objection, but I do want to say this, Your Honor. In the event that Your Honor does rule that this is unconstitutional, the presumption which the government is relying on, I am going to be asking Your Honor to reopen my proof with regard to that particular element of the crime based on the fact that it was not raised pretrial, and it was not raised during my putting on the government's case in chief, and it wasn't until we got into the defense proof I found out this was what was going to happen.

I would submit in all fairness the government [p. 1387] should be allowed to go back and open its proof with regard to that element only, Your Honor, since we went

into this trial relying upon that presumption and still rely on it with regard to that particular element under the statute.

I just want to put the Court on notice of the government's position as soon as possible. I know Your Honor doesn't want to talk about that now.

THE COURT: I don't want to talk about it now and I will make one comment about – well, we will talk about it later. It would have been a lot easier for me to permit you to do that if the motion had been made immediately after the defendants made their motion for judgment of acquittal than it is for me to do it now after we are midway through the defendants' proof. It just makes it a much more difficult issue for me to decide whether you should be permitted to do that or not.

MR. NEWSOM: Your Honor, please, the only proof that has been put on with regard to the defendant is one witness.

THE COURT: I understand there has been no proof with reference to this particular issue, but just as far as the jury's hearing of the case and the way the case flows, it is just a lot easier with the jury [p. 1388] to say, "Before you have heard any defense proof, Ladies and Gentlemen, the government has asked to reopen its case, and I have agreed to permit the government to do that for a limited purpose." It is just a lot easier to do that than it is to let the government do it at some point in the middle of the defense case, to do it after the defense is presenting its proof. It is just very difficult.

MR. NEWSOM: That's why I am bringing it up now. If Your Honor is concerned about allowing the government to wait until a later time, I am asking to do it now, Your Honor.

THE COURT: I'm not going to let you do it now, and the reason I'm not going to let you do it now is this. We have had enumerable delays. We have had these experts who came in last week and had many problems arise in the course of the government's proof, and they didn't get to put them on. The defense went to the expense of bringing them back on Monday. We had to adjourn for one day, Tuesday, and now back Wednesday morning, and we are moving straight through the experts and going to try to get them out of town as quick as possible and not going to talk about anything else until we get them off.

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APPENDIX T

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[p. 9] MR. KLEIN: But we hadn't said a hundred on the comparables, but two hundred on the other. As I read the Court's order in terms of what we have a right to present with respect to a rebuttable presumption under the statute, we are going to see two hundred tapes in this case anyway, because as I remember this order, the Court recognizes the right to come in and prove that it is not part of the ordinary course of business [p. 10] for the sale of obscene material, and therefore, we will be bringing in –

THE COURT: That doesn't mean you will get to show every tape.

MR. KLEIN: We have to demonstrate the other materials were not obscene, Your Honor.

THE COURT: I have 403.

MR. KLEIN: I understand, that's why, and quite frankly, Your Honor, I understand what the Court has done here, and quite frankly, what I expected the Court was going to say that it is not vague, it is not ambiguous, but we have a right to bring in and rebutt the rebuttable presumption, and to the extent – I'm not sure how the Court could say we don't have a right to bring in every piece of material in the store, because that is how you prove the rebuttable presumption, that the other materials were not obscene, and it is not part of the regular trade and business, and I would ask the Court to, if the Court for some reason thinks we don't have a right to do that, that that question be certified for appeal.

THE COURT: It is not the sort of question I would think would be certified for appeal. This is just going to be a question of the Court's discretion in terms of how you go about proving something.

[p. 11] MR. KLEIN: I guess my response to the Court is to ask how else do you demonstrate that the other materials are not obscene but by showing it to the jury and giving testimony relevant to the obscenity of those materials?

THE COURT: The other materials are not obscene, and if there is no reasonable question about it – I believe I made this observation before. I believe Dan Newsom will stipulate to you that your vast collection of Disney movies, families, musicals, Oscar winners, et cetera, that those are not obscene, whatever your vast collection is.

MR. KLEIN: None of which are in the store.

MR. NEWSOM: That's right, they don't have any of those, Judge.

MR. KLEIN: None of these are in the store, but that does not mean that the next particular tape that may be sexually specific and graphic is not obscene. It enjoys a protection under the First Amendment until determined to be obscene, and under this statute that they have charged –

THE COURT: If there is a question about the obscenity of every single piece of material in you client's business, I can't see how it would be any service to your client to show them all to this jury.

[p. 12] MR. KLEIN: Because that is the way we have –

THE COURT: It is either one of two ways. Either most of the materials there is not going to be any reasonable question about whether they are obscene or not. The government will stipulate with you about it, and we can do it through a description of the contents and the nature of these tape materials. We can do it a thousand different ways other than showing the movies to the jury. If there is a real question about all these materials you want to show to the jury, your client would be a whole lot better off having never shown them.

MR. KLEIN: If, in fact, the Court is suggesting that I would be willing to discuss with the government a stipulation that the material on trial in the case is basically identical to all of the other materials contained in the store, then the Court doesn't even have to determine the similarity. The Court doesn't have to review it in advance, because they have stipulated to the first prong of Womack, but if they are not stipulating and are saying we have got to prove up our Womack status, that is no different than us having to prove the status of the other material in the store in response to the statute itself and the rebuttable presumption created. As this Court indicated

[p. 13] THE COURT: Let me ask you this. Are all the comparable materials your own materials?

MR. KLEIN: I'm sorry, I didn't hear the last part.

THE COURT: Are all the comparable materials your own materials?

MR. KLEIN: They are all materials from the store, yes.

MR. NEWSOM: That is not what they said in their motion, Your Honor.

MR. KLEIN: We have got three stores. I am still working on trying to obtain information from other stores. As of right now we have all the comparable materials from the three corporate defendant locations.

THE COURT: Well, there are bound to be ways to handle that other than – it doesn't make any sense you would want the jury to sit here for days and days.

MR. KLEIN: It does to me, Your Honor.

THE COURT: It doesn't make any sense to me that you would want that to happen. It is up to you to make those kinds of trial decisions, but I think there would be a very real question about whether you would want to obtain a favorable result for this particular client in this particular case or whether you want to, you know –

* * *

[p. 16] THE COURT: This whole thing does not make any sense to me. Just as a matter of defense strategy it doesn't make any sense to me, but I'm not the one who is crafting the defense strategy.

MR. NEWSOM: I don't know if Your Honor wants me to respond to that or not. I don't know what the defense's strategy is, either, but with regard to – well, I don't really have any comments.

THE COURT: Let's see what it is you tend to seek to introduce. This is what I want. I want the list of what it is you seek to introduce, and by introduce, I mean you want the jury to see it. We are talking about the stuff that is going to take an arguably inordinate amount of time.

Everything you seek to show to the jury in an effort to establish your claim is not, "Engaged in the business."

MR. KLEIN: I can give the Court a summary of that now. It would be my intent to show this jury every video cassette film that was sold in the store.

THE COURT: We want to know what is in there. Is there nothing in this store that the obscenity of [p. 17] which would not be in question?

MR. KLEIN: Unless they are not going to question novelty items, vibrators, things of that nature, undergarments, silk undergarments, things of that nature, but it would be my intent only to submit video tapes, but to bring all of the novelty items. It is my intent to have all the books in the store read to the jury. It is my intent to have every magazine shown to the jury. I acknowledge all of them are of a sexually explicit nature. There are no Walt Disney films in my client's locations, Your Honor. All these negligees are sexually explicit type provative [sic] clothing for women. There are novelty items, vibrators.

THE COURT: There are a zillion ways you can establish that without reading a single book to them, showing them a single film.

MR. KLEIN: How can they known whether or not a particular other sexually explicit video tape is obscene or not under the Miller test without viewing it and considering in its entirety whether it appeals to prurient interest, whether it is patently offensive and whether it lacks serious value? They are obligated to do that to determine whether it is obscene or not, and since the statute mandates that we have – a rebuttable presumption that we have a right to put in [p. 18] evidence to rebutt, how can they make that determination whether it is part of our regular course of business unless they have had an opportunity to see and view the other materials and make a determination whether or not they are obscene? The can't make that determination without looking at the material or hearing the book or looking at the magazine.

THE COURT: If they are all similar to the tape, if everything is just like the tape in this case, you get nothing else by this defense. This case is going to rise and fall on whether the jury thinks this particular tape is obscene, and all you get if you seek to this route is, you know, the increased chance that a very conservative jury will be completely turned off by your client's business. That is just –

MR. KLEIN: I understand the Court's opinion on that, and I have my own beliefs and reasons why I believe it is totally relevant, both under the statute and for the purpose of what we are doing with the jury. Certainly, Your Honor, under these circumstances and in the best interest of my client I think this is the defense that I have to put on. I don't think I have an alternative. If the prosecution is willing to stipulate in effect to the first

prong of Womack and the similarity, we may be able to avoid doing that, but –

[p. 19] THE COURT: He doesn't know what they are.

MR. KLEIN: I have never seen them, and I'm not disposed to stipulate to something, number one, on anything I have never seen.

I mentioned the response that I filed with the Court concerning this issue of similarity, and I will be quiet in a second, but I think there is a distinction between – the defendant says he has to show on his rebuttal presumption everything else in the store was not obscene. I think that the statute states whether or not he is a dealer, engaged in the business of selling materials – well, to tell you the truth, I am too tired to articulate to the Court what I am trying to say.

THE COURT: The focus is not on the nature of every single article in this man's business.

MR. NEWSOM: That is true.

THE COURT: The focus is on what he does for a living.

[p. 20] * * *

MR. KLEIN: If I can point out to the Court on page five of the Court's order that was handed to us the Court notes: "The legislative history suggests that the defendant can rebutt the presumption by evidence that the articles or publications were offered for sale or transfer in the course of carrying on the defendant's general trade or business in lawful books, magazines, audio or

video products, and that he did not, in the regular course of business, devote time, attention or labor to the selling of obscenity." Not the particular film, but of obscenity, and that was what was going on in the store. No difference than if we were B. Dalton and brought in all these films and books and magazines [p. 21] that did not have sexually explicit –

THE COURT: Except as best I can tell from what you are telling me, all these other materials that you want to show to the jury present about the same question as to whether or not they are obscene as the tape that is the subject of this prosecution, which you might as well come in and say, "Ladies and Gentlemen, this is what my client does. He sells stuff like this. Do you think it is obscene or not?"

MR. KLEIN: I have every intention of doing that to the jury, Your Honor, exactly.

THE COURT: There is therefore no reason for you to even worry with the engaged in the business defense, because if you fail – you are not going to succeed on that and fail on other issues. It is going to be one or the other.

* * *